83-50

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GROLIER INCORPORATED, et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

First Amendment Issues Relating To The Remedy

1. In reviewing a Federal Trade Commission remedial order which impinges upon petitioners' First Amendment rights, did the Court of Appeals for the Ninth Circuit err by applying a standard of review merely requiring that the remedy be reasonably related to the violations rather than the appropriate standard of review which provides that the remedy must contain the least restrictive alternative sufficient to accomplish the governmental purpose of preventing deception.

Issues Regarding The Disqualification Of The Administrative Law Judge

2. Where an administrative law judge (ALJ) presiding over an agency adjudicative proceeding formerly served for eight years as attorney-advisor to an agency commissioner who participated in the prosecution and/or investigation that resulted in that proceeding, does the Administrative Procedure Act and/or the Due Process Clause of the Fifth Amendment mandate the ALJ's disqualification?

PARTIES TO THE PROCEEDING

The following companies were respondents in the administrative proceeding below, and are petitioners herein: Grolier Incorporated; American Peoples Press, Inc.; Americana Corporation; Americana Interstate Corporation; Career Institute, Inc.; Federated Credit Corp.; Grolier Enterprises, Inc.; Grolier Interstate, Inc.; Grolier New Era Corp.; Grolier Reading Program, Inc.; Madison Enterprises, Inc.; R.H. Hinkley Company; Spencer International Press, Inc.; The Grolier Society, Inc.; and Richards Company, Inc. Respondent herein is the Federal Trade Commission.[1]

[1] Pursuant to Supreme Court Rule 28.1, petitioners hereby inform the Court that petitioners have no parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Grolier Incorporated and fourteen of its wholly-owned subsidiary corporations (hereinafter collectively "Grolier") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming and enforcing an order issued by the respondent Federal Trade Commission (hereinafter "FTC").

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals (hereinafter *"Grolier II"*), reported at 699 F.2d 983 (9th Cir. 1983), are set forth in Appendix A. The Final Order of the Federal Trade Commission, reported at 99 F.T.C. 379 (1982), the original FTC opinion and order, reported at 91 F.T.C. 476 (1978), and other pertinent orders issued by the

respondent are set forth in Appendices B, D, E, and F. The initial opinion by the Court of Appeals (hereinafter "*Grolier I*"), reported at 615 F.2d 1215 (9th Cir. 1980), is contained in Appendix C.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 10, 1983, and amended on March 2, 1983. On April 11, 1983, a timely petition for rehearing was denied. App. G.[1] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fifth Amendments to the United States Constitution which provide in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . .";
>
> and
>
> "No person shall be . . . deprived of . . . property, without due process of law . . . ."

The statutory provisions involved are Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d).

The Federal Trade Commission Act states in pertinent part:

> "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *

[1] References "App. A" are to Appendix A to the Petition in this case.

"(b) . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice."

The Administrative Procedure Act states in pertinent part:

"An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or appli cation of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency."

STATEMENT OF THE CASE

Petitioners seek review of a judgment of the United States Court of Appeals for the Ninth Circuit affirming, with one judge dissenting, respondent's order compelling petitioners to make certain statements to prospective customers in their advertisements and promotional materials and in the sales presentations of their representatives. The order [2] also compels certain statements to be made to prospective sales employees prior to and during their employment interview.

[2] The complete text of the order appears in Appendix B.

Petitioners challenge the order on two grounds. First, the entire order should be vacated because it was issued in violation of the Administrative Procedure Act and the due process clause of the Fifth Amendment, since the administrative law judge (hereinafter "ALJ") who issued the initial decision should have been disqualified from sitting on the case. Second, with respect to certain order provisions described below, the FTC exceeded its remedial authority and impinged upon rights guaranteed by the First Amendment by going beyond a simple cease and desist order without making specific findings regarding the necessity of such extraordinary affirmative relief ordered.

The FTC, in its opinion and order, failed to engage in the reasoned weighing of alternative methods of achieving the governmental purpose of preventing deception which petitioners and the public are entitled to expect where the provisions of that order invade petitioners' right to speak freely. No findings of fact were made during the administrative proceeding regarding the relative effectiveness in preventing deception of various alternative remedies proposed by petitioners. Had such findings been required, the FTC's failure to prove that its order was necessary to prevent deception would have been apparent.

This failure infects three of the order's provisions in particular, and requires a reversal of the affirmance of those provisions by the Court of Appeals. First, when making home visits, petitioners' sales representatives are required to present a 3-inch by 5-inch card to each prospective customer containing certain information including the statement: "The purpose of this representative's call is to solicit the sale of encyclopedias," in 10-point bold-face type. The card may contain no information other than that prescribed by the order.[3] App. B, 6-8.

Petitioners contended below that the FTC improperly failed to consider a number of alternative, less restrictive, nondeceptive disclosures that could be made upon initial contact between a prospective customer and a Grolier sales representa-

[3] Pursuant to a modification of the order, Petitioners are permitted for one year to use a 2 inch by 3½ inch card (business card size) without the above quoted language, and thereafter to request a permanent modification of the order. App. D, 4-5.

tive at the customer's home. In all cases Grolier would be prohibited from misrepresenting its purpose in visiting the customer.[4] One such suggestion consisted of an order prescribing certain affirmative disclosures, but permitting Grolier to determine the precise manner and method of making such disclosures. Such an order would assure that the prospective customer was told the sales purpose of the representative's call. Few, if any, people will let a stranger into their homes without first ascertaining the visitor's purpose. Given these circumstances, the 3-inch by 5-inch card, which Judge Wood, dissenting in *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 977 (7th Cir. 1979) (Wood, J., dissenting), *cert. denied*, 445 U.S. 934 (1980), described as a "stark warning" and "abnormal and strange commercial behavior" that would suggest that the company was "afflicted with some strange marketplace malady," is unnecessary and unwarranted.[5]

Second, the order requires petitioners to warn prospective customers that their response to advertising or promotional materials may result in a sales representative calling on them. Three similar formats are permitted for this disclosure. App. B, 4-5. A representative example reads:

> "1. **IMPORTANT:** This card will let you know of my interest and enable your [location designation, if appropriate] sales representative to
>
> (contact me at home) (information)
> (call or visit me) with (details)
> (contact me in person) (facts)
>
> on how I may (purchase) [applicable product]."
> (buy)

---

[4] Order paragraph II(G)(1)(a) provides that Grolier must cease and desist from "[r]epresenting, directly or by implication, either orally or in writing that ... any person calling on any prospective purchaser is ... engaged in or connected with 'advertising,' 'marketing,' 'promotion,' 'education,' or anything other than the sale of encyclopedias or other educational or reference materials." App. B, 8.

[5] Since the order was issued in this case, the FTC found that Encyclopaedia Britannica had presented persuasive evidence that presentation of a business card would communicate the sales purpose of the call as well as the 3 inch by 5 inch card. *In the Matter of Encyclopaedia Brittanica, Inc., et al.*, Docket 8908, Order of October 5, 1982; App. H, 2.

The FTC found that prospective customers who responded by sending in coupons were not informed that a sales representative might telephone or visit them personally to deliver further information or promotional gifts. It further found that the possibility of such a call was a material fact in the customer's decision to respond to the advertisement which must be disclosed. App. E, 8. Thus, it ordered the extensive warning quoted above to be disclosed in two places in each advertisement, once in the text of the advertisement and once on the coupon. The FTC gave no consideration to the size limitations of the coupon in relation to the length of the specified language. *See Memphis Publishing Co.* v. *Leech*, 539 F.Supp. 405, 411-12 (W.D.Tenn. 1982) (holding a Tennessee statutory warning excessive in size). Nor did the FTC consider petitioner's argument that a statement such as "our sales representative will call" would be sufficient to serve the ostensible purpose of this order provision.[6]

Finally, the order requires the inclusion of a number of disclosures in any advertisement offering employment involving door-to-door sales. Petitioners must disclose that their sole purpose in recruiting is to employ persons for sales or solicitation and that such sales will be on an "in home" basis. Further, petitioners must include in such advertising the nature of the products or services being sold and the basis of compensating such sales representatives. App. B, 2-3.

The ALJ found that because selling encyclopedias was considered by a substantial portion of the public to be a distasteful job, Grolier's advertisements, unlike normal help-wanted advertisements, must disclose various details about the job. These same details are also required to be disclosed at the initial employment interview. App. B, 2-3. Petitioners contended below that at the initial interview, all of the details of the job could be explained in a manner not possible in a help-

[6] The FTC's modification of its *Encyclopaedia Britannica* order altered the like provision in that order to merely provide that Britannica not represent that a responding customer would not be contacted directly by a sales person. App. H, 4-5.

wanted advertisement. Therefore, the disclosure of the pertinent information, petitioners contended, should occur once at the interview, not twice as required by the order.[7]

The Court of Appeals' discussion of the recruitment advertising provision illustrates its failure to seriously consider petitioners' arguments. The Court of Appeals stated: "[r]equiring an employment advertisement to state the truth should not be overly burdensome to any recruitment effort." 699 F.2d at 988; App. A, 8. Of course this is true, and order paragraphs I(A) and I(B) prohibit Grolier from "misrepresenting in any manner, the job for which any person is being solicited," "the amount and type of training that will be given," "the purposes for which any person is engaged," and "the amount of income to be earned." App. B, 2. The real question, however, is whether the disclosures are necessary to prevent a prospective sales employee from being misled into accepting employment which differs from that which it is represented to be. This was the basis the FTC purportedly used to justify the provision. App. E, 4-5. Neither the FTC nor the Court of Appeals considered whether the advertising disclosures were a necessary supplement to the job interview disclosures in achieving this purpose.

The FTC Proceedings

On March 9, 1972, the FTC issued a complaint against petitioners. At a hearing on January 14, 1976, petitioners were informed that the Honorable Theodor P. von Brand (the ALJ assigned to this proceeding who rendered the initial decision and order) had been employed by the FTC as an attorney advisor to former FTC Commissioner A. Everett MacIntyre for approximately eight years, from 1963 through January 1971. During much or all of that period, Grolier's practices, which eventually became the basis for the complaint in this proceeding, were being actively investigated by the FTC's staff and by the individual commissioners.

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[7] This provision was also modified in the *Encyclopaedia Britannica* order by the deletion of all mandated disclosures from the help-wanted advertisement except that Britannica must disclose that it "is recruiting persons for the sole purpose of soliciting or selling." App. H, 2.

Petitioners promptly requested that the ALJ disqualify himself from further participation in the proceedings, and sought discovery of certain FTC records related to the ALJ's duties as attorney-advisor. ALJ von Brand denied both requests, stating that while he did not recall working on matters involving petitioners, he could not say that he never saw or reviewed a circulation or staff recommendation relating to them. *See* App. F, 5. By order dated February 10, 1976, the FTC denied both the motion for disqualification and the related requests for discovery. *Grolier Incorporated*, 87 F.T.C. 179 (1976). On March 13, 1978, the FTC issued an order directing petitioners to refrain from continuing certain practices and ordering it to make certain disclosures in its sales and employee recruitment communications.

Grolier I

Petitioners sought review in the Court of Appeals for the Ninth Circuit. The Court of Appeals reversed and remanded the FTC's order on the ground that it had improperly limited petitioners' discovery of the facts and circumstances surrounding ALJ von Brand's participation in the Grolier investigation while an attorney-advisor to Commissioner MacIntyre. *Grolier Incorporated* v. *FTC*, 615 F.2d 1215 (9th Cir. 1980); App. C. The Court of Appeals rejected the FTC's argument that the attorney-advisor's function is to advise, not to investigate or prosecute. App. C, 5. It also rejected petitioners' argument that the evidence sufficiently showed ALJ von Brand's involvement in the Grolier investigation to both create an appearance of impropriety and create a presumption of actual involvement in the investigation. App. C, 5, 8-9. The Court of Appeals held that it was incumbent upon petitioners to show that ALJ von Brand actually performed investigative functions, but that petitioners were entitled to further discovery from the FTC to uncover such actual involvement. App. C, 10-11.

The FTC Proceedings On Remand

On remand, the FTC granted limited document discovery and filed inconclusive affidavits of ALJ von Brand and former Commissioner MacIntyre. It denied petitioners' requests for further relevant documents without any analysis of their relevancy and denied petitioners' requests for depositions of ALJ von Brand and others. The FTC denied these requests on the basis that it had determined that there was no basis for disqualification and that in its opinion the record was sufficient to make an accurate Section 554(d) determination. The FTC made no finding that the requested discovery was either irrelevant or privileged. App. F, 6-7.

After once again denying petitioners' motion to disqualify ALJ von Brand, the FTC invited petitioners to request modification of the original order in accordance with modifications granted to Encyclopaedia Britannica, Inc. in a companion proceeding. Certain requested modifications were adopted. App. D.

Grolier II

Petitioners again sought review by the Court of Appeals for the Ninth Circuit, and on February 10, 1983, a divided panel affirmed the order as modified. *Grolier Incorporated* v. *FTC*, 699 F.2d 983 (9th Cir. 1983); App. A. The Court of Appeals affirmed the FTC's conclusion that further discovery on the disqualification issue was unnecessary. Judge Poole dissented, writing that the FTC should have allowed petitioners to depose former ALJ von Brand since "the average litigator [would] be very apprehensive when [an eight year attorney-advisor] now sits on the issues with which his principal had dealt." *Id.* at 987 (Poole, J., dissenting); App. A, 9.

On the ground that the FTC had found that petitioners' speech had been unlawful or misleading and thus constituted unprotected commercial speech, the Court of Appeals rejected petitioners' argument that the First Amendment limited the FTC's remedial power in this case. App. A, 6. Analyzing the

specific order provisions under a standard of review requiring that they bear only a reasonable relationship to the objectionable practice, the Court of Appeals affirmed the FTC's order. App. A, 7-8.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted Because The Judgment Below Conflicts With The First Amendment Principles Enunciated By This Court Applicable To Orders Restricting Commercial Speech.

In *Central Hudson Gas Corp.* v. *Public Service Commission of New York*, 447 U.S. 557 (1980), the Court explained the test by which the validity of a restriction on commercial speech was to be measured. First, the commercial speech must concern lawful activity and not be misleading. Next, the government interest asserted to justify the restriction must be substantial. If both of these requirements are met, the regulation is valid so long as it directly advances the governmental interest asserted and is not more extensive than necessary to serve that interest. Thus, the latter two parts of the four-part test only apply if the communication is not misleading. The Court of Appeals erroneously construed *Central Hudson Gas* as permitting Grolier's future speech to be restricted in any manner reasonably related to the violations the FTC found (including, presumably, an outright ban of both deceptive and non-deceptive speech), because Grolier's prior speech had been found by the FTC to have been misleading. This petition, however, does not challenge the FTC's power to restrict misleading speech. Such speech will be prevented by unchallenged provisions of the order prohibiting misrepresentations in Grolier's sales and employee recruitment materials. Rather, the issue is whether the FTC can restrict petitioners' future speech by requiring a particular disclosure, where other disclosures would both satisfy the purposes of the order and have less drastic effects on Grolier's business.

In such circumstances, the Court's four-part analysis (including the final part which provides that the restriction be no more extensive than necessary to serve the governmental interest) enunciated in *Central Hudson Gas* is applicable. The failure of the FTC and Court of Appeals to conduct this analysis warrants review by this Court. Indeed, *Central Hudson Gas* left open the question of whether "potentially" misleading speech requires different treatment from non-misleading speech. That question was answered in *In the Matter of RMJ*, 455 U.S. 191 (1982):

> "[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, the states may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the states may not place an absolute prohibition on certain types of potentially misleading information . . . if the information also may be presented in a way that is not deceptive. . . . Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception." (*Id.* at 937.)

Thus, even in potentially misleading speech cases, the restriction must be tailored to the prevention of deception. The most that can be said of petitioners' future speech in the circumstances of this case is that it is "potentially misleading." Surely, it has not already been condemned as actually deceptive.

A number of the challenged order provisions fail to satisfy the requirement set forth in *Central Hudson Gas* and in *RMJ* that they be no broader than reasonably necessary. In effect, the Court of Appeals has permitted the punishment of petitioners through an excessive restriction on its future speech, solely because the FTC found that Grolier had in the past made misleading statements. As stated in *United States* v. *Reader's Digest Ass'n*, 464 F.Supp. 1037, 1051 (D.Del. 1978), *aff'd*, 662 F.2d 955 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982): "[t]he fact that a violation of section 5 of the Act has been established, however, does not permit the Government to

ignore First Amendment interests." The FTC and the Court of Appeals did precisely this by ignoring the commands of the First Amendment solely because a violation of Section 5 had been established.[8]

II. The Writ Should Be Granted To Resolve A Conflict In The Decisions Of Various Courts Of Appeals Regarding The Standard Of Review To Be Applied To Federal Trade Commission Orders Restricting Speech.

The Court of Appeals for the Third, Seventh, and District of Columbia Circuits, as well as two other panels of the Ninth Circuit, have required FTC orders which impinge upon the free speech of respondents to be "necessary" or "reasonably necessary" to achieve the governmental objective of eliminating deception, *i.e.*, that they contain the least restrictive alternative necessary to serve the governmental interest. These courts have modified FTC orders which failed to meet this test. The Court of Appeals here, however, applied the pre-*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), standard of review for FTC remedial orders, which merely requires that the remedy be "reasonably related" to the violation sought to be remedied. It thus failed to recognize any limiting impact exerted by the First Amendment on the FTC's remedial powers. As the cases discussed below show, no other court has failed to recognize some limitation on the FTC's remedial authority, based upon First Amendment concerns.

In *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), the FTC ordered Beneficial to cease using the terminology "instant tax refund." Beneficial argued unsuccessfully before the FTC that it should be permitted to utilize the slogan with the addition of qualifying language to prevent readers from being misled into believing

[8] That the FTC views its remedial powers as untouched by the First Amendment is indicated by its decision in *The Kroger Company*, 98 F.T.C. 639, 756 n.46 (1981). There, the FTC did not reach Kroger's constitutional claims, because it found that its order was the least restrictive alternative. The FTC noted, however, that the remedy was designed in this manner to allow flexibility, not because of any compulsion due to constitutional constraints.

that the "instant tax refund" was different from Beneficial's ordinary consumer loans. The FTC rejected this argument, stating that the only possible remedy was the total prohibition of the offending phrase. The Court of Appeals for the Third Circuit set aside the ban on the words "Instant Tax Refunds" and remanded the case to the FTC. The court, recognizing that a mere "reasonable relationship" between the violation and remedy was insufficient, held:

> "We do not believe that the Commission's conclusion as to the capacity of qualifying language to apprise Beneficial's audience of the true nature of the offered service can be sustained. We acknowledge, of course, that we are ordinarily obliged to defer broadly to the Commission's exercise of informed discretion in framing remedial orders that bear some rational relationship to the removal or prevention of an established violation. . . . But we are dealing in this case with the government regulation of a form of speech. *The first amendment requires, we believe, an examination of the Commission's action that is more searching than in other contexts.*
>
> "It is now established beyond dispute that there is no commercial speech exception to the first amendment. . . . That does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law. . . . It does mean that the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation." (542 F.2d at 618-19; citations omitted; emphasis added.)

The Third Circuit has more recently held that despite the FTC's broad remedial powers, the First Amendment requires that a remedy be no more restrictive than "reasonably necessary" for the prevention of future violations. *American Home Prods. Corp.* v. *FTC*, 695 F.2d 681, 713 & n.50 (3d Cir. 1982) *quoting United States* v. *Reader's Digest Association*, 662 F.2d 955, 965 (3d Cir. 1981), *cert. denied*, 455 U.S. 908 (1982).

In *Warner-Lambert Co., Inc.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), the court held that the FTC ordered disclosure—"contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity"—had to be modified by deleting the confessional preamble, "contrary to prior advertising." The intended purpose of the preamble was to draw attention to the correction which followed. Since that purpose was served by other provisions of the order relating to conspicuousness, the preamble was unnecessary and unwarranted. *Id.* at 763.

In *Standard Oil Co. of California* v. *FTC*, 577 F.2d 653 (9th Cir. 1978), the Ninth Circuit reviewed an FTC order which, based upon the finding of three deceptive advertisements concerning one product, restricted the advertising of all of Standard Oil's products. The court modified the order, in part because of First Amendment concerns:

> "Moreover, first amendment considerations dictate that the Commission exercise restraint in formulating remedial orders which may amount to a prior restraint on protected commercial speech. . . . Although it is generally accepted that false commercial advertising may be prohibited . . . these orders go far beyond elimination of the specific misrepresentations which were made and also beyond what in fairness could be deemed necessary to deter future unlawful conduct. . . . At a minimum, administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness." (*Id.* at 622; citations omitted.)

Other courts have also stated that an FTC remedy can go no further than reasonably necessary to prevent future deception. *Litton Industries, Inc.* v. *FTC*, 676 F.2d 364, 373 (9th Cir. 1982); *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161-62 (7th Cir. 1977) *cert. denied*, 439 U.S. 821 (1978); *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 972-73 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

III. The Writ Should Be Granted To Decide An Important Question Of Federal Law Regarding The Reach Of The Prohibition Against Commingling Of Functions Within An Administrative Agency.

The ALJ who issued the initial decision in this proceeding should have been disqualified. For the ALJ to preside after having served as an attorney-advisor to one of the FTC Commissioners during a period when that Commissioner performed many investigative and prosecuting functions with respect to petitioners constituted an impermissible commingling of investigative (or prosecutorial) and adjudicative functions, in violation of 5 U.S.C. § 554(d).

Under Section 5(c) of the Administrative Procedure Act (hereinafter "APA"), 5 U.S.C. §554(d), employees of the FTC are prohibited from participating or advising in adjudicative decisions or recommended decisions in any case in which they have also engaged in "investigative or prosecuting functions." One of the principal purposes underlying this section is that decisions are to be based upon record evidence. The *Final Report Of The Attorney General's Committee On Administrative Procedure* (1941), the major study upon which the present Administrative Procedure Act was based, states:

> "It is clear that when a controversy reaches the stage of hearing and formal adjudication, the persons who did the actual work of investigating and building up the case should play no part in the decision. This is because the investigators, if allowed to participate, would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal. (Report of the Attorney General's Committee on Administrative Procedure 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 50 (1941).)

Based upon the Committee's recommendations, the APA gives hearing examiners, now ALJs, a special place in the administrative process. Unlike the agency heads who are the policy-makers of the agency, the ALJs were recommended to be a

"separate unit in each agency's organization" with "no functions other than those of presiding at hearings . . . and . . . deciding the cases that fall within the agency's jurisdiction." *Id.* at 50.[9]

Since this procedural scheme, including the separation of functions provisions, was designed to maintain public confidence in the fairness of the agency's processes as well as actually forestall unfairness, the Court has concluded that it is the duty of the courts "to construe [the APA] to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 42-46 (1950). *See also Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F.2d

[9] The Act provides extensive protection to ALJs from undue influence by other employees of the agency with which they are employed. It provides for the taking of evidence by an ALJ who is (1) "assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as hearing examiners" (5 U.S.C. §3105); (2) only subject to removal, suspension, reduction in grade or pay "for good cause established and determined by the Merit Systems Protection Board" (5 U.S.C. § 7521); and (3) "entitled to pay prescribed by The Office of Personnel Management independently of agency recommendations or ratings" (5 U.S.C. §5372). Additionally, the APA requires that the public record constitute the exclusive record for decision (5 U.S.C. §556(d)), and that the ALJ not consult with or be responsible to an employee engaged in the prosecuting or investigative functions (5 U.S.C. §554). Finally, it protects the ALJ from *ex parte* contracts by persons both within and outside the agency (5 U.S.C. §557(d)).

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court recognized the central place ALJs hold in the administrative adjudicative process. In holding that ALJs are entitled to absolute immunity from damage liability for their judicial acts, this Court stated that there could be little doubt that ALJs were "functionally comparable" to federal judges. It detailed the provisions of the APA which were incorporated to secure fair and competent hearing personnel since that was viewed as "the heart of formal administrative adjudication." *Id.* at 514, *quoting Final Report of the Attorney General's Committee on Administrative Procedure* 46 (1941). The Court of Appeals for the Second Circuit has described these protections as a "comprehensive bulwark to protect AJLs from agency interference" in order "to maintain public confidence in the essential fairness of the process." *Nash* v. *Califano*, 613 F.2d 10, 16 (2d Cir. 1980). *Accord, U.S. Health Club, Inc.* v. *Major*, 292 F.2d 665, 666-67 (3d Cir.), *cert. denied*, 368 U.S. 896 1962). Congress gave administrative law judges enhanced stature in 1978 when it adopted the Civil Service Commission's change in titles from "hearing examiners" to "administrative law judges." Pub.L. 95-251, 92 Stat. 183 (1978), *codified in* 5 U.S.C. §3105 note.

260 (D.C. Cir. 1962). As the following discussion shows in order to dispel the improper appearances which the APA condemns, the "engaged in the performance of investigation or prosecuting functions" language of Section 5(c) of the APA should be construed as including attorney-advisors of FTC Commissioners engaged in those functions.

The Court of Appeals in *Grolier I*, however, held

> "that under 554(d), attorney-advisors are 'precluded only from participating in the adjudication of cases in which they have actually performed such ["investigative and prosecuting"] functions, and in "factually related" cases.'" (615 F.2d at 1221; App. C, 9; quoting *Au Yi Lau* v. *I.N.S.*, 555 F.2d 1036, 1043 (D.C.Cir. 1977))

In so holding, the court rejected petitioners' argument that the ALJ should be charged with participation in the investigation or prosecution of petitioners during his tenure as attorney-advisor because his commissioner had so participated.[10] Petitioners submit that the Court of Appeals' construction of the statute does not "eliminate, so far as the text permits, the practices it condemns."

The close relationship between attorney-advisors and commissioners within the FTC has been well-documented in FTC responses to former attorney-advisors requesting to participate in FTC proceedings on behalf of respondents. Former Chairman Phillip Engman wrote:

> "An attorney-advisor is a confidential assistant, outside any chain of authority and answerable only to his Commissioner. He occupies a uniquely sensitive position because he typically has access to the whole of his Commissioner's business and his opportunity to witness Commission decision-making is unparallelled. In my judgment, an attorney-advisor performing his typical function can scarcely avoid contact with each major issue coming before

[10] The court misconstrued petitioners' argument to state that the ALJ is chargeable with all investigative and prosecutorial activities undertaken by the FTC, as opposed to his individual Commissioner. The court, thus, concluded that petitioners were arguing for *per se* disqualification by virtue of the ALJ's former position. 615 F.2d at 1221; App. C, 5, 8-9.

> the Commission. For that reason, I believe Commissioners' confidential advisors have an ethical responsibility as stringent as that of the Commissioners themselves, and I generally would charge an attorney-advisor with the same inside knowledge chargeable to his Commissioner." (FTC letter of September 29, 1975, to Robert W. Fleishman, Esq., regarding *Exxon Corp.*, Docket No. 8934; App. I.)

The full FTC has since recognized the appropriateness of Chairman Engman's comments.[11] In a letter to Ms. Nancy Buc, a former attorney-advisor to Chairman Kirkpatrick, the FTC denied a request to participate in *National Talent Associates, Inc.*, [1976-79 Transfer Binder] Trade Reg. Rep. (CCH) ¶21,366 (1977). Ms. Buc had stated that she had no knowledge of the National Talent Associates matter during her tenure at the FTC. The FTC, in denying her clearance to appear before it, replied:

> "An attorney-advisor has an opportunity for in-depth exposure to the full range of confidential information which comes before the Commission. *The close relationship which typically exists among a Commissioner and his or her staff, together with an attorney-advisor's customary attendance at Commission meetings, warrants the not un-*

[11] The Court of Appeals without discussion held that the decisions regarding attorney clearance "are not authority for a *per se* approach in the altogether different area of disqualification." 615 F.2d at 1221, n.6; App. C, 8-9. Although the Court of Appeals did not disclose its rationale for this assertion, the FTC had once claimed that "the clearance rules concern impropriety resulting from access to inside information whereas the principal question involving an ALJ's participation is one of bias or prejudgment." *The Kroger Company*, Dkt. 9102 (Feb. 1, 1979). The assumption that an ALJ's disqualification does not result from access to inside knowledge was rejected in *Grolier I*. Nevertheless, the Court of Appeals offered no other analysis which justifies distinguishing the disqualification of an attorney from that of an ALJ.

The *Grolier I* court also noted that these clearance rules were no longer followed even in the clearance context citing a letter from the FTC to Robert Wald of August 16, 1978. App. K. The Wald letter, however, distinguished earlier clearance decisions on the basis that the information to which the former attorney-advisor had access could confer no present advantage within the meaning of the clearance rules. 16 C.F.R. 4.1(b). *See* letter from FTC to Mark Tuller (Nov. 16, 1978); App. M. (following *National Talent Associates* and denying clearance).

reasonable public perception that the advisor either has some involvement in or knowledge of all matters reviewed in the Commissioner's office." (Emphasis added.)[12]

Petitioners submit that given the nature of their functions, former attorney-advisors should not be permitted to later serve as administrative law judges in cases where they or their commissioners had performed investigative or prosecuting functions. Such a rule avoids much of the need to examine the internal operations of the Commissioner's offices as well as dispelling doubt created by the failure to be able to thoroughly discover those internal operations. Judge Poole, dissenting in *Grolier II*, stated: "But I question whether having to proceed in the light of Judge von Brand's prior relationship as attorney-advisor for eight years during former Commissioner MacIntyre's tenure would not cause the average litigation to be very apprehensive when that attorney-advisor now sits on the issues with which his principal had dealt." 699 F.2d at 989 (Poole, J., dissenting); App. A, 9.

As indicated earlier, public confidence in the decision-making process was of major concern to the drafters of the Administrative Procedure Act. The public, in viewing the circumstances of this case, like the clearance cases, can "look only to the kind of position the employee occupied and the kind of inside information he was likely to be exposed to in that position." *See* FTC Letter of September 29, 1975, to Robert W. Fleishman, Esq., regarding *Exxon, et al.*, Docket No. 8934; App. I, 2. Indeed, the FTC has adopted such a presumption of exposure to non-public information in its clearance rules adopted after the passage of the Ethics in Government Act, 18

[12] The Court of Appeals in *Grolier I* recognized the close relation between agency members and their attorney-advisors. In *dictum*, the court stated that the exemption "from the 554(d) prohibition by APA language immunizing 'the agency or a member or members of the body comprising the agency' " (615 F.2d at 1220; App. C, 8) applies to attorney-advisors because of their "necessarily close relationship" to their "agency members." *Id.* Thus, while finding that the relationship between attorney-advisors and their commissioners was such to treat them as one and the same for certain Section 554(d) purposes, the Court of Appeals refused to permit such treatment in inferring the attorney-advisors' participation in investigative or prosecutive functions.

U.S.C. § 207. *See* 16 C.F.R. § 4.1(b)(3).[13] Imputation of inside information is common in other disqualification contexts as well. For example, "confidential information presumptively possessed by . . . [one attorney] would be imputed to the other members of the . . . firm" for the purpose of attorney disqualification. *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 710 (7th Cir. 1976).

The ALJ in the proceedings below did not deny having participated in matters involving petitioners; he merely could not recall whether he had or had not; similarly, no explicit denial of participation came from the Commissioner under whom he served.[14] Furthermore, the structure of the FTC, as described in the clearance letters quoted above, indicate that in the normal course of events the ALJ would have come into contact with the Grolier investigations during his eight year tenure as attorney-advisor. Not only were numerous Grolier-related matters before the Commission (and Commissioner MacIntyre in particular) during those years, but also extensive investigations of nearly every door-to-door encyclopedia sales company were being conducted.

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[13] Supreme Court Rule 7 also recognizes the improper appearances created by a law clerk later participating in a case that was pending during the clerk's tenure. The Court in *Fredonia Broadcasting Corp., Inc.* v. *RCA Corp.*, 569 F.2d 251 (5th Cir. 1978), described the special place law clerks hold in the judicial system. The Court noted that the Courts of Appeals of the First Circuit and the District of Columbia have rules similar to that of this Court, and the practice of the Tenth Circuit and various district courts is the same although they have not promulgated formal rules. *Id.* at 255 n.5.

[14] In *Grolier I*, the Court of Appeals held that the FTC must disclose "sufficient information to permit it and a reviewing court to make an accurate 554(d) determination." 615 F.2d at 1222; App. C, 10. On remand, the FTC disclosed some documents and two affidavits by ALJ von Brand and former Commissioner MacIntyre. The former commissioner stated that ALJ von Brand had been assigned exclusively to formal matters (i.e., matters in which a complaint had been filed) while serving as attorney-advisor. The ALJ, however, stated that he had engaged in the normal functions of an attorney-advisor, including informal matters. Neither affiant could recall whether the ALJ participated in or reviewed circulations concerning any Grolier matter. In *Grolier II*, the Court of Appeals stated that ALJ von Brand's declaration

(Footnotes continued on following page)

IV. The Writ Should Be Granted To Decide An Important Issue Arising Under The Due Process Clause Of The Fifth Amendment Regarding The Commingling Of Prosecutorial And Judicial Functions In A Single ALJ.

Petitioners submit that even if the ALJ who presided over this proceeding was not disqualified pursuant to the APA, the Due Process Clause of the Fifth Amendment mandated that disqualification. In *Amos Treat & Co.* v. *SEC*, 306 F.2d 260 (D.C.Cir. 1962), the Court of Appeals for the District of Columbia held that in order to comport with due process, an administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness."

> " 'At the very least, quasi-judicial proceedings entail a fair trial. As the Supreme Court has said in another context:
>
> " 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored but to prevent even the probability of*

(Footnotes continued from preceding page)

"disclaimed receiving any ex parte information." 699 F.2d at 986; App. A, 3. On the contrary, ALJ von Brand's stated that he could not rule out the possibility that he reviewed a circulation or staff recommendation relating to petitioners. The Court of Appeals, over Judge Poole's dissent, held that the FTC had produced sufficient information to show that ALJ von Brand had not been "involved in the Grolier investigation." 699 F.2d 987; App. A, 4. The showing made by the FTC was plainly insufficient to make a Section 554(d) determination. Given such conflicting and inconclusive affidavits, the proper procedure would have been to allow further inquiry into the nature of ALJ von Brand's duties as attorney-advisor. The Commission's complete foreclosure of such further inquiry was in derogation of the duty imposed upon it by *R. A. Holman & Co.* v. *SEC*, 366 F.2d 446, 453 (2d Cir. 1966), *modified*, 377 F.2d 665 (2d Cir.), *cert. denied*, 389 U.S. 991 (1967), cited with approbation in *Grolier I*, 615 F.2d at 1222; App. C, 11. ("If the Commission had refused to divulge *anything* at all about the nature of the preliminary investigation . . . this would be an unfair restriction of an inquiry into possible disqualification. . . ")

unfairness.'" (*Id.* at 263, *citing In re Murchison*, 349 U.S. 133 (1955); emphasis added.)[15]

The appearance of propriety requires that administrative decision-makers have no prior contact with the facts obtained through the agency's investigation or prosecution of the case, except through proceedings conducted on the record. Even the reasonable possibility that ALJ von Brand obtained facts prior to the hearing through his investigative or prosecutive functions as Commissioner MacIntyre's attorney-advisor is sufficient to create an appearance of impropriety.

The ALJ's position as attorney-advisor assigned to informal matters closely identifies him with a person directly charged with investigating and prosecuting petitioners. For such a person to later function as ALJ (a position the APA goes great lengths to protect from agency influence) creates the sort of distrust in the system which the appearance of propriety standard is designed to forestall.

An appearance of impropriety can be created by an individual's position, even absent any actual involvement in the case. In *American General Ins. Co.* v. *FTC*, 589 F.2d 462 (9th Cir. 1979), the court held that an administrative decision-maker was not qualified to participate in proceedings where he had acted as counsel in earlier proceedings. The Court stated:

> "That the judge's or quasi-judicial officer's participation in the case as counsel may have been superficial rather than substantial does not affect the applicability of the principle. In [*Trans World Airlines, Inc.* v. *CAB*, 254 F.2d 90 (D.C. Cir. 1958)], the member of the Civil Aeronautics Board there found to be disqualified had signed a brief in the same case which argued different questions than those involved in the proceeding upon which he sat after his

[15] *See also e.g., American Cyanamid Company* v. *FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Trans World Airlines, Inc.* v. *CAB*, 254 F.2d 90, 91 (D.C.Cir. 1958); *Cinderella Career and Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583 591 (D.C.Cir. 1970); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 760 (D.C.Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965); *Pregent* v. *New Hampshire Dept. of Employment Security*, 361 F.Supp. 782, 797 (D.N.H. 1973).

> appointment to the CAB. . . . As previously noted, it has been the uniform practice of Supreme Court Justices to decline participation in cases pending in the Department of Justice during their tenure as Attorney General. In many such cases it is probably true that the Attorney General personally took no substantial part whatever in actually working on the case. But his mere responsibility for administrative supervision of the Department, regardless of the extent of his knowledge and his approval of the acts of his subordinates, has been deemed sufficient to activate the disqualification rule." (589 F.2d at 464-65; footnote omitted.)

The Court of Appeals below held that any appearance of impropriety was dispelled by the affidavits of former Commissioner MacIntyre and ALJ von Brand. *Grolier II*, 699 F.2d at 987. However, neither of those affidavits contained a denial of involvement in the investigation or prosecution of petitioners. Both affiants could only state that they could not recall ALJ von Brand being involved. Under an appearance of impropriety standard, it does not matter what ALJ von Brand might subjectively believe about how his prior role as an attorney-advisor did or did not affect his ability to give petitioners a fair trial. Rather, the test is whether a reasonable person would find improper ALJ von Brand's presiding over the Grolier matter. Indeed, in judicial disqualification cases arising under 28 U.S.C. § 455—which incorporates an "appearance of impropriety" test—judges routinely recuse themselves even though they believe they could give an objecting party a fair and impartial trial. *E.g.*, *Roberts* v. *Ace Hardware, Inc.*, 515 F.Supp. 29, 31 (N.D.Ohio 1981); *Hampton* v. *Hanrahan*, 499 F.Supp. 640, 645 (N.D.Ill. 1980); *Marshall* v. *Georgia Pacific Corp.*, 484 F.Supp. 629, 631 (E.D.Ark. 1980). *See United States* v. *Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969).

CONCLUSION

For the reasons expressed above, the petition for a writ of certiorari should be granted.

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GROLIER INCORPORATED, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

Nos. 82-7018, 82-7178

United States Court of Appeals

FOR THE NINTH CIRCUIT

GROLIER INCORPORATED, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

Argued and Submitted Sept. 14, 1982
Decided Feb. 10, 1983
As Amended March 2, 1983

Before KILKENNY and POOLE, Circuit Judges, and D. Williams*, Senior District Judge.

DAVID W. WILLIAMS, Senior District Judge.

Grolier, Incorporated [Grolier] petitioned for review of a cease and desist order of the Federal Trade Commission [FTC] respecting certain of its sales and recruiting practices. Petitioner is engaged in the door-to-door and mail order sale of encyclopedias and other reference publications. This case was before us once before and we remanded to the FTC to reconsider whether the administrative law judge [ALJ] should be disqualified and whether Grolier should be granted additional discovery on the subject of such disqualification. *Grolier, Inc.* v. *FTC*, 615 F.2d 1215 (9th Cir. 1980) [Grolier I].

The issues presented by this petition are (1) whether the Commission on remand was correct in declining to disqualify ALJ von Brand and refusing to allow the taking of his and others depositions; (2) whether the FTC order is reasonably related to Grolier's deceptive and misleading commercial practices; and (3) whether the Commission abused its discretion by proceeding against Grolier through adjudication rather than by fashioning rules or standards for the entire industry.

* The Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

THE DISCOVERY/DISQUALIFICATION ISSUE

Prior to his appointment as an ALJ, von Brand served as an attorney-advisor to former FTC Commissioner MacIntyre from 1963 to 1971. ALJ von Brand became hearing officer in this case after the original ALJ retired in 1975 and another recused himself. At petitioner's insistence, he began what was practically de novo pretrial hearings. After von Brand had presided in the case almost a full year, Grolier's president testified that he may have met with Commissioner MacIntyre in 1966.[1] Von Brand responded that he had no recollection of any matters involving Grolier in his work for the Commission. Grolier then promptly demanded von Brand's recusal under the Administrative Procedure Act 5 U.S.C. §554(d) [APA] which provides:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings.

Von Brand refused to disqualify himself, stating that legal advisors to Commissioners were not agency employees within §554(d).

On appeal, we reversed, holding that the ALJ's former position was covered under the APA. In tracing the legislative history of the APA, we found that Congress intended to forbid persons who were engaged in the performance of investigative or prosecuting functions, or who were privy to ex parte information concerning a case, from participating in the decision-making process in that case. *Grolier I* specifically rejected the company's contention that disqualification is automatic if the ALJ held his former position during a time when an FTC investigation of Grolier was in progress:

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[1] The actual testimony was "I only recall having met Mr. MacIntyre and I don't remember or I think, I am quite sure at one of the earlier discussions with the chairman he was there, but it was a very informal discussion just trying to say who I was and where I hoped to be able to take the company in the following 20 years."

> We conclude, therefore, that under 554(d) attorney-advisors are precluded only from participating in the adjudication of cases in which they have actually performed [investigative and prosecuting] functions, and in 'factually related' cases.

615 F.2d at 1221.

Hence, for purposes of disqualification the ALJ is not chargeable with involvement in all cases that were before the agency during his advisorship. Rather, Grolier must prove that von Brand had actual possession of ex parte information concerning the investigation or had participated in some meaningful way in the events that led to the agency's decision to prosecute.[2]

In remanding for reconsideration of the disqualification issue, *Grolier I* also addressed the discovery that the company should be granted on the matter:

> We do not say that the FTC must grant discovery; but we do say that a flat refusal to disclose anything at all about ALJ von Brand's prior involvement in the Grolier case is error. The FTC must produce sufficient information to permit it and a reviewing court, to make an accurate 554(d) determination.

Id. at 122.

Following *Grolier I*, the agency furnished Grolier with von Brand's declaration which disclaimed receiving any ex parte information about the Grolier case while acting as attorney-advisory. The FTC also furnished the affidavit of former Commissioner MacIntyre in which he stated that to the best of his recollection he did not discuss Grolier with Mr. von Brand and he was aware of no contacts von Brand may have had with any Grolier matters as an attorney-advisor.[3] Grolier now

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[2] The burden of proof is upon Grolier to show that von Brand should have been disqualified. *R.A. Holman & Co.* v. *SEC*, 366 F.2d 446, 452 (2d Cir. 1966).

[3] Furthermore, Grolier acquired much more information from the FTC than the two affidavits. At an earlier stage of these proceedings, after the FTC refused to disqualify von Brand, Grolier received exhaustive document discovery from the FTC both voluntarily and through a Freedom of Information Act request. Apparently, Grolier could find nothing in all these documents which connected the ALJ to the instant case.

demands that it be allowed not only to take von Brand's deposition, but also the deposition of MacIntyre, von Brand's secretary and a former attorney-advisor.

The first remand was not an order that the FTC allow depositions. We merely stated that:

> While the FTC may grant discovery, it may, initially, respond in the form of affidavits as to the existence and extent of ALJ von Brand's involvement with the Grolier case while he served as attorney-advisor. (cites omitted). If these sworn statements adequately disclose the existence or nonexistence of ALJ von Brand's involvement in prior Grolier matters, Grolier, who has the burden of proof on the disqualification issue, may rightfully be 'obliged either to offer evidence contradicting the sworn statements of the [FTC], or to point out the inadequacy and inconsistency, if any, in the sworn statements' before it will be permitted to subpoena FTC records. *R.A. Holman & Company* v. *SEC*, *Supra*, 366 F.2d at 454.

We conclude that von Brand's and MacIntyre's submitted declarations adequately show that the ALJ was not involved in the Grolier investigation. Grolier has neither offered sufficient evidence nor pointed out any inadequacy or inconsistency in the sworn statements to warrant further discovery or to bear its burden on the disqualification issue.

Moreover, Grolier points to nothing tangible that it could explore through the depositions it requests. We feel that Grolier is seeking to engage in a pure fishing expedition through these depositions and is attempting to return this marathon administrative proceeding to square one to further delay the imposition of the FTC's cease and desist order. We decline to be a party to these dilatory tactics.

Grolier also argues that due process requires the ALJ's disqualification to avoid the appearance of impropriety. This argument is on weak ground since the Supreme Court gives "a heavy presumption of honesty and integrity in those serving as adjudicators" with respect to a due process claim of bias. *Withrow* v. *Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Any appearance of impropriety here has been dispelled by the affidavits of MacIntyre and von Brand.

PROPRIETY OF THE CEASE AND DESIST ORDER

The Commission found that Grolier had engaged in a number of false, deceptive and misleading trade practices, and the company does not challenge these findings. Grolier used many deceptive recruiting techniques such as "blind" advertisements, ads misrepresenting employment positions as nonselling, and ads listing "management trainee" positions that did not exist.

The company also employed fraudulent methods to develop sales leads including false surveys, promotions and contests whose only purposes were to ensnare potential customers. Grolier instructed its door-to-door salespeople to use deception in gaining entrance into homes, to misrepresent prices and to produce false and misleading endorsement letters. Finally, Grolier regularly used fraudulent and questionable debt collection practices. In short, the undisputed record discloses that deceptive practices permeated virtually every aspect of the company's recruitment activity and its relationship with customers and potential customers.

To combat Grolier's illegal activity, the FTC order requires the company to disclose in its recruitment advertising for door-to-door salespeople the nature of the job offered and the basis for compensation; it prohibits Grolier from distributing any promotional materials or advertisements that solicit a response from a prospective customer unless the materials clearly state that the person responding may be contacted by an encyclopedia sales representative; it requires each salesperson to present to everyone he visits at home a 3 x 5 card stating that the purpose of the visit is to sell encyclopedias, and, it prohibits Grolier from using inflated "retail" prices for individual items as a basis for comparing "combination" prices and to offer "free" merchandise which in fact is not free by imposing certain requirements on the way prices may be presented. Appellant argues that several of these remedies are inappropriate to the practices sought to be eliminated.

Generally, a review of a FTC order must determine whether the Commission's remedial actions were "reasonably related" to the evil to be prevented.

> [The FTC] has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Litton Industries, Inc. v. *FTC*, 676 F.2d 364, 369 (9th Cir. 1982). The reasonable relationship test is applied by examining the specific circumstances of the case and, ultimately, determining the likelihood of Grolier committing the unfair practices addressed in the order. *Sears Roebuck & Co.* v. *FTC*, 676 F.2d 385, 391 (9th Cir. 1982). Two important factors in determining petitioner's willingness to flout the law are the deliberateness and seriousness of the present violation and the violator's past record with respect to unfair practices. *Standard Oil of Calif.* v. *FTC*, 577 F.2d 653, 662 (9th Cir. 1978).

Because the FTC order limits the company's speech, however, Grolier asserts that the standard of review on appeal is to analyze alternative remedies and narrowly tailor the relief to the interest involved. Grolier bases this contention on the demise of the commercial speech exception to the First Amendment, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), and the least restrictive alternative analysis prevalent in First Amendment cases.

Appellant's contention is incorrect. The commercial speech exception is still applicable if the commercial expression at issue is unlawful or misleading. *Central Hudson Gas and Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). Since Grolier's practices are both illegal and misleading, First Amendment protections do not apply to the FTC's order. *Sears Roebuck & Co.* v. *FTC*, *supra* at 399. Moreover, the provisions of the FTC order affecting the direct solicitation of customers by Grolier salespeople are even less subject to constitutional constraints. In person solicitation, because of its potential for abuse, can be more strictly regulated than public advertising. *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 457, 98 S.Ct. 1912, 1919, 56 L.Ed.2d 444 (1978).

Hence, we must analyze each of the order's remedial provisions challenged by Grolier to see that it bears a reasonable relation to the illegal trade practice it seeks to prevent.

The Warning Card Provision

The order commands Grolier sales representatives to show all customers a 3 x 5 card stating that "the purpose of this representative's call is to solicit the sale of encyclopedias." The record shows that Grolier has directed its salespeople to deliberately misrepresent the purpose of their home visits so that this warning card requirement is reasonably related to preventing these abuses. Such a remedy has been used in the past to correct similar unlawful activity. *Encyclopaedia Britanica, Inc.* v. *FTC*, 605 F.2d 964 (7th Cir. 1979), *cert. denied*, 445 U.S. 934, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980). Any less stringent disclosure requirement would be difficult to enforce and might allow Grolier to continue its deceptive practices.

Notice to Consumer Provisions

The order requires Grolier to place a notice in its lead gathering materials which warns that a person returning such forms or entry blanks may be contacted by a sales representative. The company claims that the need for this notice remedy was unsupported by substantial evidence.

The FTC's findings are proper if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *RSR Corp.* v. *FTC*, 602 F.2d 1317, 1320 (9th Cir. 1979). The record shows that Grolier ran deceptive national advertisements at least 15 times prior to 1972, when the FTC first filed a complaint against the company. This is clearly enough evidence to support the FTC's finding and also to show that the notice remedy bears a reasonable relation to Grolier's deceptive lead gathering activities.

The Recruiting Provisions

The FTC ordered Grolier to make certain affirmative disclosures to its employment applicants, including a verbatim copy of the cease and desist order. The company asserts that the disclosures will unduly hamper its recruitment efforts and

requests that the provision be deleted. These protestations are undercut by the abundant evidence of gross misrepresentations of fact that Grolier made in its employment advertising and hiring activities. Requiring an employment advertisement to state the truth should not be overly burdensome to any recruitment effort.

The Pricing Provisions

The cease and desist order prohibits Grolier salespeople from referring to any price as a retail price unless a "substantial number of unit sales are made at or above the represented price." The Commission found that the company frequently stated an inflated cost for its individual products, leading prospective customers to believe they were getting a special reduced rate for buying in bulk. Grolier also gave customers a list of prices for individual products which were much higher than combination prices, when, in fact, most salespeople were unauthorized to make individual sales.

The Commission found that these pricing practices were misleading and its order is narrowly tailored to eliminate them. Grolier's claims that the provisions are too costly and unnecessary are not well taken.

THE ABUSE OF DISCRETION CLAIM

Finally, Grolier asserts that the FTC's order is an abuse of discretion because it promulgates new industry standards which should be dealt with on an industry wide basis, rather than through a ruling against an individual company.

Contrary to the company's contentions, the Commission's order adheres to established industry standards. *See*, *Encyclopaedia Britanica* v. *FTC*, 605 F.2d 964 (7th Cir. 1979); *Americana Corp*, 45 F.T.C. 32 (1948), *modified* 46 F.T.C. 253 (1949). The unlawful business practices involved in this case have long been the subject of litigation by the Commission and the same remedy for these abuses has been imposed upon Grolier's competitors. *See Encyclopaedia Britanica, Inc.* v. *FTC*, *supra*. Grolier's abuse of discretion claim is groundless.

We conclude that the findings of the Commission are supported by substantial evidence and that the remedies provided were reasonably related to those findings.

The order of the Board is AFFIRMED and ENFORCED.

POOLE, Circuit Judge, dissenting.

I respectfully dissent, believing that Grolier was entitled to a confrontation by way of deposition with respect to its not-unreasonable concern that Administrative Law Judge von Brand's official position had been sufficiently close to the historical litigation of the case as to raise questions concerning his suitability for adjudication.

In *Grolier I* we rejected the contention that mere contemporaneity of tenure during prior litigation called for disqualification. The majority correctly adverts to this ruling. But I question whether having to proceed in the light of Judge von Brand's prior relationship as attorney-advisor for eight years during former Commissioner MacIntyre's tenure would not cause the average litigator to be very apprehensive when the attorney-advisor now sits on the issues with which his principal had dealt. Normally we would test any basis of conflict by the "engine" of cross-examination. A deposition with face to face questions and answers would permit such testing; an already-prepared affidavit provides no similar satisfaction.

Grolier's conduct of the litigation has left some tension in feelings but I believe a deposition could be kept entirely within bounds while the issue was explored. The majority has denied this right to Grolier and hence I dissent.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: James C. Miller III, *Chairman*
Michael Pertschuk
David A. Clanton
Patricia P. Bailey

In the Matter of GROLIER INCORPORATED, a corporation, *et al.*	Docket No. 8879 Issued: March 9, 1982

FINAL ORDER

This matter having been heard by the Commission upon remand by the United States Court of Appeals for the Ninth Circuit, and the Commission having denied a motion to disqualify Judge von Brand after allowing Grolier discovery on the matter in an Order issued August 13, 1981, and the Commission, having made certain modifications to the original cease and desist order issued on March 13, 1978, in an Order issued December 10, 1981, now reissues its Final Order, with said modifications, as follows:

IT IS ORDERED that the following Order to Cease and Desist be, and it hereby is, entered:

ORDER

I

IT IS ORDERED that respondents Grolier, Incorporated, Americana Corporation, Grolier Interstate, Inc., Grolier New Era Corp., Madison Enterprises, Inc., R. H. Hinkley Company, The Grolier Society, Inc., Spencer International Press, Inc. and The Richards Company, Inc., corporations and their successors, assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or

other device, in connection with the recruitment, training, or orientation of any person to sell, rent, lease, or distribute any textbook, encyclopedia, reference or educational material, training course or teaching machine, or any other publication, merchandise or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing directly or by implication, either orally or in writing, that:

(1) any respondent is offering positions in such fields as advertising, education, public relations, marketing, interviewing, or in any field other than door-to-door sales, if door-to-door sales is included, to any extent, in the position for which persons are being recruited; or misrepresenting, in any manner, the job for which any person is being solicited;

(2) persons will be trained as management trainees, or for other positions of responsibility concerned with administrative office functions, unless, in fact, a formal management training program is available to persons accepting employment on the basis of such representations; or misrepresenting, in any manner, the amount and type of training that will be given;

(3) any person who may be employed will contact prospects in their homes or places of business for the purposes of conducting surveys, advertising promotions, educational instruction or other nonselling functions; or misrepresenting, in any manner, the purposes for which any person is engaged.

B. Misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person, or the degree of ease or difficulty in performing any said condition imposed.

C. Failing to disclose, clearly and conspicuously, in all advertising offering employment in any way involving door-to-door sales:

(1) that the respondent concerned is recruiting persons for the sole purpose of soliciting or selling;

(2) that such soliciting or selling will be on an "in home" basis;

(3) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(4) the basis for compensating persons so engaged.

D. Failing to clearly and conspicuously advise, both orally and in writing, any prospective salesperson at the initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1) all those disclosures set forth in Paragraph I C above;

(2) a complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

(3) where applicable, notification that such person will not be paid for time spent during orientation and training;

(4) a complete and detailed description of any expense or expenses any such person may incur performing the required duties; and

(5) the percentage of persons holding similar positions engaged by the office offering the position during the twelve (12) months immediately preceding the offer, who have actually received an equivalent, or greater, income than that promised under the terms of any such agreement.

E. Failing to furnish to each applicant at the initial face-to-face interview and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II and V of this Order together with a cover letter as set forth in *Appendix A* attached hereto.

F. Making, distributing or using any training tapes, sales manuals, or any other document, method or device which contains any representation or instruction inconsistent with any provision of Paragraph I or Paragraph II of the Order.

II

IT IS ORDERED that respondents Grolier, Incorporated, Americana Corporation, Grolier Interstate, Inc., Grolier New Era Corp., Madison Enterprises, Inc., R. H. Hinkley Company, The Grolier Society, Inc., Spencer International Press, Inc., and The Richards Company, Inc., corporations and their successors, assigns, officers, agents, representatives, and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the publishing, advertising, offering for sale, sale, rental, lease or distribution of any textbook, encyclopedia, reference or educational material, training course or teaching machine, or any other publication, merchandise or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated any advertisement of promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information, unless any such solicitation clearly and conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondent's products, using one of the following disclosures:

1. **IMPORTANT:** This card will let you know of my interest and enable your [location designation, if appropriate] sales representative to

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)

on how I may (purchase) [applicable product].
(buy)

2. **IMPORTANT**: Returning this card allows me to have your [location designation, if appropriate] sales representative

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)

on how I may (purchase) [applicable product].
(buy)

3. **IMPORTANT**: Returning this card will enable your [location designation, if appropriate] sales representative to

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)

on how I may (purchase) [applicable product].
(buy)

Upon prior approval in writing of the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection, or his designee, respondent may use any other disclosure that clearly and conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondent's products. A request for approval shall be in writing and shall be deemed granted if not disapproved within 30 days after receipt by the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection.

B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II(A) above, unless one of the disclosures set forth in such Paragraph, or a disclosure approved by the Assistant Director of the Division of Compliance or his designee as satisfying the requirements of Paragraph II(A), clearly and conspicuously appears in immediate proximity to the space provided for a signature or other identification of the responding party. During the one (1) year period from the date this Order becomes final, respondent may submit a request to reopen these proceedings pursuant to Section 2.51 of

the Commission's Rules of Practice. Such petition shall contain information demonstrating that any proposed modifications of Paragraphs II(A) and II(B) will clearly and conspicuously disclose to potential purchasers of respondent's products that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondent's products. The foregoing sentence shall not be construed as a limitation of respondent's submission of additional information regarding the request to reopen, including information relating to the financial impact of Paragraphs II(A) and II(B) on respondent. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

C. Failing to disclose clearly and conspicuously, at the beginning of any telephone call to any prospective customer, the fact that the individual making the call is either soliciting the sale, rental or lease of publications, merchandise or services for respondents, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, the respondent concerned will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental or lease of said publications, merchandise or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a card 3 inches by 5 inches in dimension, with all words in 10-point bold-face type, with the following information, and none other, in the indicated order, is presented to such person:

(1) the name of the corporation;

(2) the name of the salesperson;

(3) the term "Encyclopedia Sales Representative" [or other applicable product];

(4) the terminology: "The purpose of this representative's call is to solicit the sale of encyclopedias" [or other applicable product].

Provided, however, that for one (1) year from the date this order becomes final, respondent may, in lieu of the card required by this Paragraph of the Order, substitute a business card of at least 2 inches by 3-½ inches containing only the following information:

1. the name of the corporation
2. the name of the salesperson
3. the term "sales representative"
4. An address and telephone number at which the corporation or salesperson may be contacted.
5. the product or the corporation logo or identifying mark.

During this one (1) year period, respondent shall comply in all other respects with the requirements of Paragraph II(D) above. Prior to the expiration of the aforesaid time period, respondent may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that the business card required in Paragraph II(D), as modified above, is effective in communicating to potential purchasers, prior to the entry into their homes or places of business by any of respondent's sales representative, that the purpose of the sales representative's call is to solicit the sale of respondent's products. The foregoing sentence shall not be construed as a limitation on respondent's submission of additional information regarding the request to reopen, including information on the financial impact of Paragraph II(D) on respondent. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. Respondent may continue to use the business card, as described by this proviso, during the time that a request to reopen these proceedings pursuant to this Paragraph is pending, and, if such proceedings are reopened, until the Commission determination of the matter has become

final. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

E. Failing to give the card, required by Paragraph II(D), above, to each person and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

F. Using the words "Mothers Club" or words of similar import and meaning to represent, directly or by implication, the existence of a *bona fide* educational program, club, or business entity which provides educational services or benefits to consumers or using any trade name misrepresenting in any manner the nature or purpose of their business.

G. Representing, directly or by implication, either orally or in writing that:

(1) Any person calling on any prospective purchaser is:

(a) engaged in or connected with "advertising", "marketing", "promotion", "education", or anything other than the sale of encyclopedias or other educational or reference materials;

(b) conducting, taking or participating in a survey, opinion poll, interview or any other information gathering activity; or

(c) calling on said prospect for the primary purpose of delivering of disseminating any vacation gift certificate, prize, gift, gift certificate, chance in any contest, or any other merchandise or item of chance;

(2) Only a few minutes will be required to complete the visit inside the prospective purchaser's home or place of business; or misrepresenting, in any manner, the period of time required to complete the sales or other presentation;

(3) any person contacted has been specially selected to receive any offer; or misrepresenting, in any manner, the persons or class of persons to whom said offer is available;

(4) any encyclopedia or other reference material is a new publication, or a publication which has not been previously available to the public unless such is the fact, or misrepresenting, in any manner, the extent of editorial revisions, in any encyclopedia or other reference material;

(5) any offer is limited, must be accepted immediately or within a specified time period, or is a special offer, unless such is a fact; or misrepresenting, in any manner, the nature, scope or duration of any sales offer;

(6) any publication, merchandise or service is being offered free, without cost, as a bonus, reduced in price or otherwise to any prospective purchaser of any of respondent's publications, merchandise or services agreeing to perform any advertising promotional or selling function, including but not limited to, any of the following acts or similar acts:

(a) permitting their names to be listed as local owners of the product or services;

(b) providing the name of any person who may be interested in purchasing any publication, merchandise or service;

(c) writing a letter evaluating the merits of any publication or other item which may be used in advertising;

(d) displaying any publication or other item in a conspicuous location in his home;

(e) keeping any publication or other item current by purchasing an annual yearbook or by purchasing any research service;

(f) completing installment payments for any item in a period of time less than the period of time initially represented; or

(g) paying a membership fee in order to participate in the Consumer Buying Educational Service, or any other program, club, service or entity which provides an opportunity for participants to purchase merchandise at a savings from the retail prices for

such merchandise, or paying a fee to participate in any similar program, club, service or entity; or

(h) misrepresenting, in any manner, that any publication, merchandise or service is being offered free, without cost, as a bonus, or reduced in price to any person;

(7) any publication, merchandise or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of any of respondents' publications, merchandise or services, pursuant to any agreement to purchase, rent or lease any other publication, merchandise, or service, or combination thereof, from such respondent, unless:

(a) the contract price for the purchase, rental or lease of any such other publication, merchandise, service, or combination thereof, has remained at the said price or above for at least six (6) months within the last twelve (12) months immediately preceding the time at which the representation is made;

(b) no publication, merchandise or service has been offered free, without cost or given as a bonus or otherwise with the sale, rental or lease of any such other publication, merchandise, service or combination thereof, to any person for a period of at least six (6) months within the last twelve (12) months immediately preceding the time at which the representation is made;

(c) no publication, merchandise, service, or combination thereof, of equivalent or greater value, has been eliminated by such respondent from any such other publication, merchandise, service, or combination thereof, with which the free, without cost or bonus publication, merchandise or service is being offered;

Provided However, any such prices as are restricted by Paragraph II G (7)(a) of this Order may be altered at any time by the respondent concerned to reflect *bona fide* changes in market conditions.

H. Misrepresenting, in any manner, the terms, conditions, method, rate or time of payment actually made available to any person.

I. Representing, directly or by implication, either orally or in writing that:

(a) any person using any research service will receive answers to questions on any subject; or misrepresentating, in any manner, the scope of, or restrictions imposed upon the use of, any such research service;

(b) any answer provided by a research service is the product of detailed, exhaustive or original research generated by the specific question asked by any person utilizing said service unless such is the fact; or misrepresenting, in any manner, the extent of individual attention, research, preparation or quality of any answer furnished by any such research service;

(c) any answer provided by any research service is a suitable or acceptable substitute for any term paper, theme or other report; or misrepresenting, in any manner, the benefit or use of any answer provided by any research service;

(d) any research service is being offered at any price or that the research service has a retail value unless such is the fact;

(e) the cost to any respondent of any research service represents a retail value.

J. (1) Failing to disclose, clearly and conspicuously, in writing on all promotional materials describing any research service, and orally during the course of any sales or other presentation relating to said service, each condition or limitation placed upon the use of such research service.

(2) Failing to disclose applicable limitations on the time within which answers will be supplied by any research service in writing on all promotional materials and orally during the course of any sales presentations relating thereto.

K. (1) Representing, directly or by implication, through the use of any oral statement, written quotation, picture or any other means that any publication, merchandise or service has received an endorsement, recommendation, or sponsorship from any educational, religious, or other institution or other entity or from any person, unless the stated endorsement is genuine and authentic in all respects, and discloses the year or edition of the publication to which such endorsements pertain, if a publication is involved.

(2) Using, publishing, or referring to any testimonial or endorsement unless (1) such use, publication, or reference is expressly authorized in writing and unless (2) respondents have good reason to believe that at the time of such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained.

(3) Representing, in any manner, that an endorsement or testimonial has been recently executed or is current unless this is the fact.

(4) Misrepresenting, in any manner, that any person is calling on a prospective customer with the endorsement, recommendation, or sponsorship of another person or organization.

L. Failing to disclose:

(1) clearly to the officials of any educational institution being visited, where a purpose of such visit is to obtain the institution's permission to disseminate through the institution promotional material which solicits the sale of any product to the parents of the children enrolled in the educational institution, and which is designed to secure leads for in-home sales presentations, prior to any such dissemination, that the purpose of disseminating such promotional materials is to secure leads for in-home sales presentations;

(2) conspicuously on the face of such promotional materials within the scope of L(1) that dissemination of such promotional materials through the educational institution does not constitute an endorsement or a recommendation by the institution or its officials that such materials being promoted should be purchased unless such is the fact.

M. Representing to any person, directly or by implication, either orally or in writing that:

(1) any price is the retail, regular, usual or words of similar import or effect, price for any publication in any binding, merchandise of service, unless the respondent concerned is making a substantial number of its unit sales for each such publication in each such binding, merchandise or service, individually, at or above the represented price;

(2) any price is the retail, regular, usual, or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless the respondent concerned is making a substantial number of its unit sales for each such set of publications in each such binding individually or in combination at or above the represented price;

(3) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from any of respondents' former prices for its products unless:

(a) such savings claims are based upon retail, regular, or usual prices, or combination prices, arrived at in accordance with Paragraph II M(1) and (2) above;

(b) respondents clearly and conspicuously specify the publication, merchandise or service, or combination thereof, and the price from which the savings are to be realized; and

(c) the publication, merchandise or service is of comparable quality in all materials respects with the publication, merchandise or service sold at the higher price;

(4) savings may be realized by the purchase, rental or lease of any publication, merchandise or service, or any combination thereof, from comparable products of competitors unless:

(a) the respondent concerned clearly and conspicuously specifies the publication, merchandise or service, or combination thereof, from which the savings are to be realized;

(b) the price utilized for comparison purposes is the price at which a substantial number of persons have purchased the item referred to in (a) immediately above;

(c) the item referred to in (a) above is of comparable quality in all material respects to the product being sold;

(d) respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in the trade area where the comparison is made which establishes the validity of said compared price.

N. Misrepresenting in any manner, either orally or in writing:

(1) the amount of savings to be realized by any person who enters into an agreement with any respondent for any publication, merchandise or service; or

(2) that any publication, merchandise or service is being offered free or without charge, or is given to any such person.

O. Failing to comply with any and all provisions of the Commission's Trade Regulation Rule, *Cooling-Off Period For Door-To-Door Sales* (16 C.F.R. 421.1), which are in effect on the date this Order becomes effective, and with any modifications or changes in the aforesaid Rule which may be made. A copy of the said Rule shall be made a part of this Order for purposes of complying with other provisions hereof.

P. Initiating contact with any purchaser through any means for any reason from the time said purchaser enters into any agreement containing a NOTICE OF CANCELLATION, as required by Paragraph II O of this Order, until said buyer's cancellation period has expired.

Q. Failing to maintain a copy of each NOTICE OF CANCELLATION received pursuant to Paragraph II O of this Order, and making said documents available for inspection and copying by the Commission's staff upon reasonable notice. Any respondent receiving such NOTICE shall maintain it for a period of three (3) years from date of receipt.

R. Failing to create adequate records, which shall be maintained for a period of three (3) years and made available to the Commission's staff for inspection and copying upon reasonable notice, from which the validity of any savings claims, retail price claims, comparative value claims, or other representations of the type described in Paragraphs II G(7), II M and II N of this Order can be determined, and making any pricing claims within the scope of this provision unless there are in existence for at least the six (6) months preceding such claims records from which the validity of such claims can be determined.

S. Failing to attach to any contract for the sale, rental or lease of any publication, merchandise, service or combination thereof a written statement that clearly and conspicuously discloses, and only discloses, the following information in the indicated order and manner:

(1) in 12-point bold-face type size the terminology:

PRICE LIST

THE FOLLOWING PRICES ARE THE ***ONLY*** AUTHORIZED PRICES AT WHICH THE LISTED ITEMS MAY BE OFFERED.

ANY PRICE NOT LISTED BELOW IS UNAUTHORIZED AND FALSE.

(2) a list of all publication, merchandise, services or combination thereof currently offered for sale, rental or lease, and in immediate conjunction thereto each price at which any respondent is authorized to offer said product or service pursuant to Paragraph II M of this Order.

(3) in 12-point bold-face type the terminology, when applicable:

FREE ITEMS

ONLY THE FOLLOWING PRODUCTS AND SERVICES MAY BE OFFERED FREE. YOU ARE PAYING FOR ANY ITEMS RECEIVED AND NOT LISTED BELOW.

(4) a list of all publications, merchandise or services currently offered as free, without cost, or as a bonus pursuant to Paragraph II G(7) of this Order.

T. Failing to orally instruct any person at the time said person signs any contract for sale, rental or lease, of any publication, merchandise, service or combination thereof, pursuant to an oral sales presentation, that a "Price List" is attached to said person's contract.

III

IT IS FURTHER ORDERED that respondents Grolier, Incorporated, American Peoples Press, Inc., American Interstate Corp., Career Institute, Inc., Grolier Enterprises, Inc., and Grolier Reading Programs, Inc., corporations, and their successors or assigns, their officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary or division, or other device, in connection with the advertising, offering for sale, sale or distribution of any textbook, encyclopedia, reference or educational material, training course or teaching machine, or any other publication, merchandise or service through the use of any program, plan, method or device, that provides or purports to provide for the sale or distribution of any of said items to any person on an approval basis, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, either orally or in writing that:

(1) any person has the option to receive each publication, merchandise or service, separately and individually, and to accept or reject same, unless such person is allowed in all instances to receive and to purchase or reject each such publication, merchandise or service separately and individually;

(2) any person will not receive any further publication, merchandise or service after the respondent concerned has received a timely notification of the person's cancellation of any such program, plan or method of sale or distribution, unless such is the fact; or misrepresenting, in any manner, any consequence resulting from any person's cancellation of his participation in any such program, plan, or method of sale or distribution; and

(3) any person incurs no risk or obligation by joining or participating in any such program, plan, or method of sale or distribution; or misrepresenting, in any manner, any condition, right, duty of obligation imposed on any person.

B. Disseminating, or causing the dissemination of, any advertisement which fails to disclose in a clear and conspicuous manner:

(1) a description of the conditions and terms of any such program, plan, or method of sale or distribution, and the duties, risks and obligations of any subscriber thereto; and

(2) a description of each publication, merchandise or service to be offered for sale, the billing charge to be made therefor, the anticipated total number of publications, merchandise or services included in any such program, plan or method of sale or distribution, the number of publications, merchandise or services that will be included in each shipment of such items, and the number of and the intervals between each such shipment.

C. Failing to disclose, clearly and conspicuously, on any return coupon, order form or any other document used for responding to any such program, plan, or method of sale or distribution, the following information:

(1) the anticipated total number of publications, merchandise or services included in any such program, plan, or method of sale or distribution;

(2) the number of publications, merchandise or services that will be included in each shipment of such items; and

(3) the number of and the intervals between each such shipment.

D. Failing to disclose, clearly and conspicuously, in immediate conjunction with any publication, merchandise, service or notice thereof sent to any subscriber the anticipated date on which the respondent from whom the subscriber obtained any of such items will initiate processing of the next shipment of any such item.

E. Failing to provide to any person in conjunction with each notice of any shipment of any publication, merchandise or service, a clear and conspicuous means by which said person may exercise his option or right to cancel said shipment, if such is his right.

IV

IT IS FURTHER ORDERED that respondents Grolier, Incorporated, American Peoples Press, Inc., Americana Corporation, Americana Interstate Corp., Federated Credit Corp., Career Institute, Inc., Grolier Interstate Inc., Grolier New Era Corp., Madison Enterprises, Inc., R. H. Hinkley Company, Spencer International Press, Inc., The Grolier Society, Inc., and The Richards Company, corporations, and their successors, assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the collection or attempted collection of any debt allegedly due and owing pursuant to any contract or other agreement relating to the purchase or other receipt of any textbook, encyclopedia, reference or educational material, training course or teaching machine, or any other publication, merchandise or service, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, either orally or in writing that:

(1) any company, corporation, or entity engaged in collection of monies allegedly due or owing to such concerns or any other company, corporation or entity has separate *bona fide* departments or divisions for legal matters, unless such are the facts; or misrepresenting, in any manner, the existence, or functions of any division or department of any company, corporation or entity;

(2) the Code of Federal Regulations, or any other federal regulation or statute, provides that any employee of the Federal Government who has any outstanding debt due or owing may be subject to dismissal from the federal service for failure to pay said debt unless the respondent concerned can demonstrate that sufficient facts exist with regard to the employee to whom the representation was made which establish the propriety of such claim;

(3) any person who utilizes the United States mails to obtain any publication, merchandise or service and who fails to pay or becomes delinquent in paying for any such item will be subject to prosecution for mail fraud under federal law unless the respondent concerned can demonstrate that sufficient facts exist, with regard to persons to whom the representation was made, which establish the propriety of such claims; or misrepresenting, in any manner, the rights, duties, or obligations of any person arising from any federal, state, or local statute, ordinance, or regulation;

(4) any respondent utilizes the services of credit reporting companies or other entities for persons who disseminate credit information in a manner which will adversely affect the public or general credit rating of any person who has become delinquent in paying any debt unless the respondent concerned can demonstrate that sufficient facts exist, with regard to the person to whom the representation was made, which establish the propriety of such claim, or misrepresenting, in any manner, that any person's public or general credit rating will be adversely affected;

(5) any letter, notice or other communication which has been prepared, originated or composed by any respondent has been prepared, originated or composed by any other person, firm or corporation;

(6) suit will be instituted to recover any delinquent debt, or that any delinquent debt will be transferred to any attorney with instructions to institute suit, or that any other legal step to collect any outstanding debt will be taken, unless a definite date is set forth for such action and such

are the facts; or misrepresenting, in any manner, respondents' relationship with, or instructions to, any attorney, or the course of action that will be taken by any attorney or misrepresenting in any manner that any account has been transferred to any person or entity for collection unless those are the facts.

B. Using any correspondence forms or any written materials which appear to depict official legal process.

V

For the purpose of the following provisions of this Order, the terms "respondents" shall apply to each of the respondents named in Paragraph I and II of the Order.

IT IS FURTHER ORDERED that respondents:

A. Deliver by registered mail, a copy of this Decision and Order to each of their salesmen, agents, solicitors, or other persons engaged by respondents, solicitors, or other persons engaged by respondents for the promotion, sale or distribution of any of the publications, merchandise or services included in this Order, and to any person engaged by respondents to perform such duties in the future at the time such person is so engaged;

B. Obtain from each person described in Paragraph V A, a signed statement setting forth their intention to conform their business practices to the requirements of this Order; retain said statement during the period of three (3) years thereafter; and make said statement available to the Commission's staff for inspection and copying upon reasonable notice;

C. Advise each such present and future salesman, agent, solicitor, or other person engaged by respondents for the promotion, sale or distribution of any of the publications, merchandise or services included in this Order that respondents will terminate the engagement or services of any such person, unless such person agrees to and does furnish to respondents a statement required by Paragraph V B, above; and

D. If any such person will not agree to file a statement with respondents as required by Paragraph V B above, and be

bound by the provisions of this Order, the respondents shall immediately terminate the services of such person.

E. Furnish the Commission on a quarterly basis with a list, including business addresses, of those independent or outside distributors who have purchased or otherwise obtained for resale any of the publications, merchandise or services included in this Order.

VI

IT IS FURTHER ORDERED that the respondent shall forthwith distribute a copy of this Order to each of their operating divisions.

VII

IT IS FURTHER ORDERED that respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of which may affect compliance obligations arising out of this Order.

VIII

IT IS FURTHER ORDERED that respondents shall, within sixty (60) days after the effective date of this Order, file with the Commission a report in writing setting forth in detail, the manner and form in which they have complied with this Order.

By the Commission.

SEAL

Carol M. Thomas
Secretary

APPENDIX A
NOTICE

Attached hereto are the *pertinent provisions* of a cease and desist order entered against Grolier, Incorporated and certain of its subsidiaries, including Grolier Interstate, Inc. by the Federal Trade Commission, an agency of the Federal Government. Violation of any provision of this Order can result in severe monetary penalties to Grolier, Incorporated and Grolier Interstate, Inc. If you are employed by Grolier, Incorporated or any of its subsidiaries, you will be *required* to observe the provisions of this Order. Violation of any provision of this Order by an employee constitutes a violation of a federal law.

You should carefully read this Order before agreeing to any employment arrangement with Grolier, Incorporated or any of its subsidiary companies. (President)

_____

(President)
GROLIER, INCORPORATED

APPENDIX C

No. 78-2159

United States Court of Appeals

For the Ninth Circuit

GROLIER INCORPORATED, *et al.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Jan. 24, 1980.
As Amended on Denial of Rehearing
April 17, 1980.

Before WALLACE and ANDERSON, Circuit Judges, and SOLOMON,* District Judge.

OPINION

WALLACE, Circuit Judge:

On March 13, 1978, the Federal Trade Commission (FTC) entered a final cease and desist order against Grolier, Incorporated and 14 of its wholly-owned subsidiaries (Grolier) designed to correct Grolier's adjudged violations of 15 U.S.C. §45. By this appeal, pursuant to 15 U.S.C. §45, Grolier seeks to have that order set aside because of alleged procedural and substantive errors. We set aside the order and remand this case to the FTC for further consideration.

* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

I

Grolier is engaged in the door-to-door and mail order sale of encyclopedias and related reference publications. On March 9, 1972, the FTC issued an administrative complaint charging Grolier with unfair methods of competition and unfair or deceptive acts or practices in connection with its sales activities, pricing representations, promotion techniques, recruitment practices, debt collection, and mail order operations. The case was initially assigned to an Administrative Law Judge (ALJ), who, after presiding at hearings throughout 1973 and 1974, retired from federal service before rendering a decision. A second ALJ was then assigned to complete the case, but he promptly recused himself. In February 1975, Theodore P. von Brand, the third ALJ assigned to the case, began hearings and decided to recall many of the witnesses who had previously testified in the proceedings. In January 1976, four months before completion of the hearings, ALJ von Brand informed the parties that he had served as an attorney-advisor to former FTC Commissioner A. Everett MacIntyre from 1963 through January 1971, during which period Grolier was intermittently investigated and charged by the FTC. Records available to Grolier indicated that Commissioner MacIntyre attended at least one meeting between it and representatives of the FTC.

Upon learning of ALJ von Brand's advisory responsibilities during the eight-year period, Grolier requested that the judge disqualify himself from further participation in the proceedings. The judge denied the request, stating that he did not recall working on matters involving Grolier while serving as legal advisor to the Commissioner. Grolier then filed with the FTC a formal motion for disqualification and removal of ALJ von Brand, at the same time requesting the FTC to permit discovery of specified FTC records which would have tended to show the nature and extent of the judge's contact with the Grolier case. The FTC denied both the motion for disqualification and the requested discovery.

After hearing a substantial part of the case *de novo*, ALJ von Brand concluded the hearings in May 1976 and issued his decision and recommended cease and desist order in October

1976. On appeal, the FTC adopted in large part the decision and order of ALJ von Brand and reaffirmed denial of the disqualification motion and request for discovery.

II

Grolier argued before the FTC, and now argues before us, that failure to disqualify ALJ von Brand from the case violated both section 554(d) of the Administrative Procedure Act (APA), 5 U.S.C. § 554(d), and the Due Process guarantee of the Fifth Amendment. Grolier also claims that the FTC erred in denying the requested discovery. Upon considering the 554(d) claim and the denial of discovery, we remand the case to the FTC for further consideration. Consequently, we do not here reach Grolier's claims of due process violation and of error in the cease and desist order.

A. Section 554(d)

Most federal administrative agencies combine within one organization a number of responsibilities that our system of government normally seeks to separate. They formulate policy as does the legislature, administer policy as does the executive, and adjudicate controversies as does the judiciary. They investigate infractions of statutes or regulations, prosecute those against whom their investigation has established a prima facie case, and judge the case they themselves have presented. W. Gellhorn & C. Byse, Administrative Law, Cases and Comments 1035 (1974). Nowhere is this combination of functions more apparent than in the FTC.

> [T]he Federal Trade Commission receives a charge, ordinarily filed by a consumer or a competitor, that a business concern is engaging in an unfair trade practice. The charge is investigated by the Commission's personnel. If the Commission's investigator digs up enough evidence to show the charge to be substantial, a complaint issues in the Commission's name. An attorney employed by the Commission presents evidence (or "prosecutes") in support of the complaint at a hearing before an administrative law judge named by the Commission. The Commission's

> designated judge considers whether the Commission's attorney has proved the soundness of the Commission's case against the respondent. And in the end the Commission, aided by its staff, decides whether or not the respondent has committed the unfair trade practice of which the Commission had complained.

Id. at 1035-35.

In an effort to minimize any unfairness caused by this consolidation of responsibilities, the APA mandates an internal separation of the investigatory-prosecutorial functions from adjudicative responsibilities. The relevant portion of APA § 554(d) states:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title. . . .

5 U.S.C. § 554(d).[1] To violate section 554(d), then, an agency employee must, in the same or a factually related case, (1)

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[1] The full text of section 554 separation of functions provision states:

> (d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—
>
> (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
>
> (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.
>
> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—
>
> (A) in determining applications for initial licenses;
>
> (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
>
> (C) to the agency or a member or members of the body comprising the agency.

5 U.S.C. § 554(d).

engage in "investigative or prosecuting functions,"[2] and (2) "participate or advise in the decision." Neither Grolier nor the FTC contests the fact that ALJ von Brand's actions meet the latter of these two requirements. The point of their disagreement, and the issue which we must resolve, is whether ALJ von Brand meets the first requirement, i.e., whether his employment as an attorney-advisor to Commissioner MacIntyre constituted "investigative or prosecuting functions" in this or a factually related case.

Grolier contends that attorney-advisors come within the meaning of "investigative or prosecuting functions" because they are chargeable with knowledge of all matters that come before the FTC during their employment. Grolier urges that Congress intended to prevent adjudication by persons previously exposed to *ex parte* information like that developed by the FTC in its investigative and prosecutive activities. In other words, because ALJ von Brand is presumed to have knowledge of every FTC investigation conducted during his eight-year tenure as an attorney-advisor, Grolier would disqualify him from participating in the adjudication of any case investigated during that period, even those with which he had no contact.

The FTC's argument is equally extreme. It contends that because Congress was principally concerned with preventing adjudication by those who have developed, through investigative or prosecutorial zeal, a "will to win" that is incompatible with objective adjudication, section 554(d) applies only to those employed in the actual investigative and prosecutive branches of the FTC. Since attorney-advisors are employed in neither of those branches, the FTC contends that

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[2] Despite the statutory language that an employee is precluded from participating in the adjudication of a case only when he is "engaged" in the investigation or prosecution of that case, we conclude that Congress did not intend to limit the separation of functions to those persons contemporaneously performing both. Such a reading would permit an agency employee to become immersed in the investigation of a case, resign from the investigative position, and then be appointed judge to render the decision. Such was not the intention of Congress. *See* S.Rep. No. 572, 79th Cong., 1st Sess. 18 1945), *reprinted in* Administrative Procedure Act—Legislative History, 79th Congress 1944-46, at 204 (1946); H.R.Rep. No. 1980, 79th Cong., 1st Sess. 27 (1946); *reprinted in* Administrative Procedure Act—Legislative History, 79th Congress 1944-46, at 262 (1946).

ALJ von Brand is not disqualified by section 554(d). Under such analysis, even an attorney-advisor who involves himself in a case to the point of losing all objectivity could later, without violating the APA, render judgment in that case simply because he was never employed in certain branches of the FTC organization. Neither Grolier's nor the FTC's position is convincing. To determine the scope of section 554(d), we must examine the legislative history of the APA.

In 1939 President Roosevelt "directed the Attorney General to name 'a committee of eminent lawyers, jurists, scholars, and administrators to review the entire administrative process in the various departments of the executive Government and to recommend improvements, including the suggestion of any needed legislation.'" *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 38-39, 70 S.Ct. 445, 449, 94 L.Ed. 616, *modified*, 339 U.S. 908, 70 S.Ct. 564, 94 L.Ed. 1336 (1950). The report of this committee became the blueprint for the APA and is "still a primary source of information about the federal administrative process." K. Davis, Administrative Law and Government 13 (2d ed. 1975);, *Wong Yang Sung* v. *McGrath*, *supra*, 339 U.S. at 44, 70 S.Ct. 445. In responding to the much criticized union of the investigative, prosecutive and adjudicative functions within agencies, the committee report suggested the creation of hearing commissioners, now administrative law judges, as a "separate unit in each agency's organization" with "no functions other than those of presiding at hearings . . . and . . . deciding the cases that fall within the agency's jurisdiction." Report of the Attorney General's Committee on Administrative Procedure 50 (1941), S.Doc. No. 8, 77th Cong., 1st Sess. 50 (1941) (footnote omitted). Two reasons crucial to our decision were given for this recommended separation: "the investigators, if allowed to participate [in adjudication], would be likely to interpolate facts and information discovered by them ex parte and not adduced at the hearing, where the testimony is sworn and subject to cross-examination and rebuttal"; and "[a] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." *Id.* at 56.

It is evident that Congress intended to address these two concerns by separating investigative-prosecuting functions from adjudicative functions. Section 554(d)(1)[3] expressly forbids ALJ acquisition of *ex parte* information. This provision, along with 5 U.S.C. § 557(d)(1),[4] illustrates Congress' concern over possible use in the decision process of information received outside of the controlled adjudicative setting. Congress' second concern, precluding from adjudicative functions those who have developed a "will to win," is evident in the legislative history of the APA. In explaining its adoption of language substantially the same as that currently contained in section 554(d), the Senate Judiciary Committee specifically adopted the majority recommendation of the Attorney General's Committee, expressing concern over the "man who had buried himself in one side of an issue." Senate Judiciary Committee Print, 79th Cong., 1st Sess. 15 (1945), *reprinted in* Administrative Procedure Act-Legislative History, 79th Congress 1944-46, at 25 (1946) (hereinafter "APA Legislative History").

Regarding the APA, the Supreme Court has stated that "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung* v. *McGrath, supra*, 339, U.S. at 41, 70 S.Ct. at 450. We conclude that by forbidding adjudication by persons "engaged

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[3] *See* note 1, *supra*.

[4] Section 557(d) states in part:

"(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceedings;

". . . ."

in the performance of investigative or prosecuting functions" Congress intended to preclude from decisionmaking in a particular case not only individuals with the title of "investigator" or "prosecutor," but all persons who had, in that or a factually related case, been involved with *ex parte* information, or who had developed, by prior involvement with the case, a "will to win." An attorney-advisor may, therefore, come within the prohibition of section 554(d) if he has had such involvement. The FTC decision to the contrary was error.[5]

The FTC argues, however, that even if section 554(d) has the broad meaning that we conclude it does, ALJ von Brand and all other former attorney-advisors are exempted from the 554(d) prohibition by APA language immunizing "the agency or a member or members of the body comprising the agency." 5 U.S.C. § 554(d)(2)(C). It contends that the necessarily close relationship between attorney-advisors and agency members requires that an advisor be extended privileges coequal with his commission member's responsibilities so that he may freely advise the member on the full range of problems considered by the FTC. This argument would be compelling if made on behalf of an attorney-advisor or other FTC employee who must counsel the member at both the investigative and decision-making stages of a case. But ALJ von Brand is no longer an attorney-advisor; his ALJ position does not necessitate involvement in the adjudication of this particular case. The exemption from 554(d) was created only for those positions in which involvement in all phases of a case is dictated "by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases." S.Rep. No. 572, 79th Cong., 1st Sess. 18 (1945), *reprinted in* APA Legislative History at 204; H.R.Rep. No. 1980, 79th Cong., 1st Sess. 27 (1946), *reprinted in* APA Legislative History at 262; *see Amos Treat Co.* v.

[5] In concluding that former attorney-advisors are not within the proscription of 554(d), the FTC focused solely upon the congressional desire to prevent adjudication by those who had developed a "will to win." *In re Grolier, Inc.*, 87 F.T.C. 179, 180 (1976). With such a narrow focus, their conclusion was not unreasonable. It was erroneous, however, because it overlooked the equally important congressional desire to prevent adjudicative interpolation of *ex parte* facts.

S.E.C., 113 U.S.App.D.C. 100, 106, 107, 306 F.2d 260, 266-67 (D.C. Cir. 1962). We reject the argument that ALJ von Brand is exempted from the 554(d) separation of functions.

As mentioned earlier, Grolier contends that ALJ von Brand is chargeable with knowledge of all investigative and prosecutorial activities undertaken by the FTC during his tenure as an attorney-advisor. Therefore, it argues, actual possession of *ex parte* information in the Grolier case need not be shown; ALJ von Brand is disqualified *per se* by virtue of his former position. The authority cited in support of this argument is not persuasive.[6] Moreover, we can find no court that has adopted a *per se* approach to disqualification under 554(d). On the contrary, those courts which have considered the question have focused not upon the former position of the challenged adjudicator, but upon his actual involvement, while in that former position, with the case he is now deciding. See *Au Yi Lau* v. *I.N.S.*, 181 U.S.App.D.C. 99, 106, 555 F.2d 1036, 1043 (D.C. Cir. 1977); *Cisternas-Estay* v. *I.N.S.*, 531 F.2d 155, 158, 160-61 (3d Cir.), *cert. denied*, 429 U.S. 853, 97 S.Ct. 145, 50 L.Ed.2d 127 (1976); *Twigger* v. *Schultz*, 484 F.2d 856, 858, 861 (3d Cir. 1973); *R. A. Holman & Co.* v. *S.E.C.*, 366 F.2d 446, 451-54 (2d Cir. 1966), *modified*, 377 F.2d 665, *cert. denied*, 389 U.S. 991, 88 S.Ct. 473, 19 L.Ed.2d 482 (1967); *Amos Treat Co.* v. *S.E.C.*, *supra*, 306 F.2d at 265-67. We conclude, therefore, that under 554(d), attorney-advisors are "precluded only from participating in the adjudication of cases in which they have actually performed such ["investigative and

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[6] Grolier seeks support from FTC decisions denying former attorney-advisors the right to practice before the FTC in a particular case. *E.g.*, *National Talent Association, Inc.*, [1976-79 Transfer Binder] Trade Reg.Rep. (CCH) FTC Complaints & Orders 21,366 (1977). Such decisions are not authority for a *per se* approach in the altogether different area of disqualification. Moreover, they are no longer followed by the FTC even in cases where they have precedential value. Letter from the FTC to Robert Wald (Aug. 16, 1978).

The position urged by Grolier would also produce an unnecessarily impractical approach to the problem of separation of functions. ALJ von Brand, who served as an attorney-advisor from 1963 to 1971, would be disqualified from judging any case that was investigated or prosecuted by the FTC during that eight-year period. We need not adopt such a restrictive approach in order to comply with the mandate of section 554(d).

prosecuting"] functions, and in 'factually related' cases." *Au Yi Lau* v. *I.N.S.*, *supra*, 181 U.S.App.D.C. at 106, 555 F.2d at 1043. For purposes of disqualification, they are not chargeable with involvement in all cases that were before the agency during their advisorship.

In resolving the question of ALJ von Brand's qualification to adjudicate the Grolier case, then we must look to his activity during the time that he served as attorney-advisor to Commissioner MacIntyre. If he was sufficiently involved with the case to be apprised of *ex parte* information, 554(d) requires his disqualification. His current inability to recall that information is irrelevant. Once an attorney-advisor is shown to have been "engaged in the performance of investigative or prosecuting functions" through prior acquaintance with *ex parte* information, 554(d) says he "may not . . . participate or advise in the decision . . ." of the case. It does not condition this disqualification upon recollection of the *ex parte* facts.

Grolier has the burden of showing ALJ von Brand's prior acquaintance with *ex parte* information. *R. A. Holman & Co.* v. *S.E.C.*, *supra*, 336 F.2d at 452; *S.E.C.* v. *R. A. Holman & Co.*, 116 U.S.App.D.C. 279, 282, 323 F.2d 284, 287 (D.C. Cir.), *cert. denied*, 375 U.S. 943, 84 S.Ct. 350, 11 L.Ed.2d 274 (1963). Where, as here, the court is presented with no evidence of actual involvement in the Grolier case by then attorney-advisor von Brand, the normal course of action would be to refuse to disqualify him. In this case, however, Grolier attempted to require such evidence by requesting discovery of specified FTC documents. If discovery was wrongly denied, Grolier was improperly hindered in its efforts to meet its burden of proof and failure to do so should not weigh against it. We therefore consider the propriety of the FTC's refusal to permit discovery.

B. Discovery Request

The FTC's denial of Grolier's request for discovery was the direct result of its erroneous conclusion that attorney-advisors did not perform "investigative or prosecuting functions" within the meaning of 554(d). After making that conclusion it stated: "Because we do not believe that Judge von Brand would be

subject to disqualification even if it could be shown that he advised Commissioner MacIntyre on matters pertaining to these respondents, the discovery requests are denied." *In re Grolier, Inc.*, 87 F.T.C. 179, 181 (1976). From the discussion in Part A of this opinion, it is evident that ALJ von Brand's prior involvement in the case is not irrelevant as the FTC supposed; rather, it is the very crux of the disqualification issue.

We conclude, therefore, that the case should be remanded to the FTC for reconsideration of the discovery denial and, in light of the results of that reconsideration, the disqualification motion. We do not say that the FTC must grant discovery; but we do say that a flat refusal to disclose anything at all about ALJ von Brand's prior involvement in the Grolier case is error. The FTC must produce sufficient information to permit it and a reviewing court, to make an accurate 554(d) determination. The need for such response has been recognized by the Second Circuit:

> If the Commission had refused to divulge anything at all about the nature of the preliminary investigation into petitioner's activities, and Woodside's role in that investigation, this would be an unfair restriction of an inquiry into possible disqualification and, if permitted, would render the *Treat* decision [which focused on the actual investigative involvement of the challenged adjudicator] a meaningless admonition, easily circumvented.

R.A. Holman Co. v. *S.E.C.*, *supra* 366 F.2d at 453; see *San Francisco Mining Exchange* v. *S.E.C.*, 378 F.2d 162, 170-71 (9th Cir. 1967). While the FTC may grant discovery, it may, initially, respond in the form of affidavits as to the existence and extent of ALJ von Brand's involvement with the Grolier case while he served as attorney-advisor. *E.g.*, *Au Yi Lau* v. *I.N.S.*, *supra*, 181 U.S.App.D.C. at 106, 555 F.2d at 1043; *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178, 1189 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975); *R.A. Holman & Co.* v. *S.E.C.*, *supra*, 366 F.2d at 453-54. If these sworn statements adequately disclose the existence or nonexistence of ALJ von Brand's involvement in prior Grolier matters, Grolier, who has the burden of proof on the dis-

qualification issue, may rightfully be "obliged either to offer evidence contradicting the sworn statements of the [FTC], or to point out the inadequacy and inconsistency, if any, in the sworn statements" before it will be permitted to subpoena FTC records. *R.A. Holman & Co.* v. *S.E.C.*, *supra*, 366 F.2d at 454.

III

After proceedings pursuant to our remand, it may be unnecessary for us to reach Grolier's constitutional challenge to the FTC procedures employed in this case. If, after the discovery issue has been properly considered by the FTC, ALJ von Brand is disqualified, the issue will become moot. If not, it may be that a more adequate record will be developed for any future determination of the due process claim. At this juncture, therefore, we do not reach that contention. Similarly, it would be inappropriate for us to consider now the merits of the appeal.

ORDER SET ASIDE AND CAUSE REMANDED.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	Docket No. 8879
GROLIER INCORPORATED, a corporation, *et al.*	Issued: December 10, 1981

ORDER MODIFYING CEASE AND DESIST ORDER

On August 13, 1981, the Commission issued an order denying respondent's motion to disqualify the Administrative Law Judge who rendered the Initial Decision in this proceeding. In its order, the Commission also invited the parties in this matter to file before the Commission their views as to whether the original Final Order of the Commission, 91 FTC 315 (1978), should be modified to conform to the modified order in *Encyclopedia Britannica*, 96 FTC 778 (1980).

On September 30, 1981, respondent filed a response to the Commission's order. In this submission, respondent first proposed modifying the *Grolier* order to incorporate modifications made in *Britannica* on October 28, 1980. Second, respondent asked for guarantees that any future modifications in *Britannica* also be granted to respondents here. Third, respondent moved that the instant proceeding be stayed until the Commission takes action on a pending motion for further modifications in the *Britannica* order. Finally, respondent also seeks a stay on the ground that a trade regulation rule-making, rather than an adjudication, is the appropriate manner to conduct further proceedings involving Grolier.

Complaint counsel, on October 14, 1981, filed its answer to respondent's submission, pursuant to the August 13 order. Complaint counsel do not oppose modification of the *Grolier* order to conform with modifications already made in *Britannica*. But, they oppose any assurances of future modifications on the ground that in the event of such modifications,

the Commission's rules afford Grolier an appropriate procedural vehicle, Rule 2.51(b), by which Grolier may petition for further modifications in its order. An assessment of whether further modifications should be made in either of the orders in question depends on facts and circumstances particular to the acts and practices of each company. Complaint counsel also oppose granting any stay in order to facilitate a conversion of this adjudication to a rulemaking proceeding.

The Commission agrees with the parties that the modifications in the *Britannica* order granted on October 28, 1980, should now be granted to Grolier. However, the Commission believes that the issue of further modifications in *Britannica* cannot now be resolved with respect to this respondent because the request for further modifications that Britannica made (and which we will allow Grolier to make) depends upon experience in complying with the first modification. See paragraphs 2 and 3, *infra*. Britannica has had this experience, but Grolier has not.* Moreover, Grolier has available to it a right to petition the Commission for reopening the *Grolier* matter should any further modifications in *Britannica* justify similar treatment of Grolier. Therefore, a stay of this matter pending further events in *Britannica* would be inappropriate.

Nor does the Commission believe a stay is justified pending resolution of this matter by an industrywide rulemaking proceeding. Respondents rely on *Ford Motor Co.* v. *FTC*, 654 F.2d 599 (9th Cir. 1981) for the proposition that rulemaking is preferable to adjudication where the Commission is attempting to change existing law or to establish rules of widespread application. In this matter the Commission did not engage in any novel interpretation of existing law as the court of appeals believed occurred in *Ford Motor Co.*, but rather the Commission declared practices to be unlawful that were established as violations of Section 5 of the FTC Act over a decade ago, see,

* Grolier's argument that it would be at a competitive disadvantage if the Commission does not now assure Grolier it will receive all future modifications granted in *Britannica* is disingenuous. As matters now stand, Britannica is bound by our order while Grolier is not. Grolier has offered no evidence that it is voluntarily complying with our order and until it does comply it probably has a competitive advantage.

e.g., *P.F. Collier & Son Corp.* v. *F.T.C.* 427 F.2d 261 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970). It is true that issues of relief involving affirmative disclosures distinguish *Grolier* from earlier cases, but the crafting of relief is particular to the facts and circumstances of each case. In this instance, affirmative disclosures were ordered because of the Commission's experience that mere cease and desist order provisions were inadequate to remedy the abuses found to be in violation of Section 5, practices that had persisted over time, despite earlier prohibitive relief. *Grolier, Inc.*, 91 F.T.C. 315, 437, n.98. In this regard, the Seventh Circuit held, in a related case, that rulemaking was not required to replace adjudication where relief differed because "[a] prior insufficient order does not necessitate the insufficiency of all later orders." *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

THEREFORE, IT IS ORDERED, that Paragraphs II(A), (B), (D), and (E) of the Order issued in this docket on March 13, 1978, shall be modified as follows:

1. Paragraph II(A) shall read:

A. Disseminating or causing to be disseminated any advertisement of promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information, unless any such solicitation clearly and conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondent's products, using one of the following disclosures:

1. **IMPORTANT**: This card will let you know of my interest and enable your [location designation, if appropriate] sales representative to

(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)

on how I may (purchase) [applicable product].
(buy)

2. **IMPORTANT**: Returning this card allows me to have your [location designation, if appropriate] sales representative

(contact me at home)
(call or visit me) with (details)
(contact me in person) (facts)

(information)

on how I may (purchase) [applicable product].
(buy)

3. **IMPORTANT**: Returning this card will enable your [location designation, if appropriate] sales representative to

(contact me at home)
(call or visit me) with (details)
(contact me in person) (facts)

(information)

on how I may (purchase) [applicable product].
(buy)

Upon prior approval in writing of the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection, or his designee, respondent may use any other disclosure that clearly and conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondent's products. A request for approval shall be in writing and shall be deemed granted if not disapproved within 30 days after receipt by the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection.

2. Paragraph II(B) shall read:

B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II(A) above, unless one of the disclosures set forth in such Paragraph, or a disclosure approved by the Assistant Director of the Division of Compliance or his designee as satisfying the requirements of Paragraph II(A), clearly and conspicuously appears in immediate proximity to the space provided for a signature or other identification of the responding party. During the one (1) year period from

the date this order becomes final, respondent may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that any proposed modifications of Paragraphs II(A) and II(B) will clearly and conspicuously disclose to potential purchasers of respondent's products that a person replies as requested may be contacted directly by a salesperson for the purpose of selling respondent's products. The foregoing sentence shall not be construed as a limitation of respondent's submission of additional information regarding the request to reopen, including information relating to the financial impact of Paragraph II(A) and II(B) on respondent. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's rules of practice.

3. Paragraph II(D) shall be amended by adding the following proviso at the end thereof:

Provided, however, that for one (1) year from the date this order becomes final, respondent may, in lieu of the card required by this Paragraph of the Order, substitute a business card of at least 2 inches by 3½ inches containing only the following information:

1. the name of the corporation
2. the name of the salesperson
3. the term "sales representative"
4. an address and telephone number at which the corporation or salesperson may be contacted
5. the product or the corporation logo or identifying mark.

During this one (1) year period, respondent shall comply in all other respects with the requirements of Paragraph II(D) above. Prior to the expiration of the aforesaid time period, respondent may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that the business card required in Paragraph II(D), as modified above, is

effective in communicating to potential purchasers, prior to the entry into their homes or places of business by any of the respondent's sales representatives, that the purpose of the sales representative's call is to solicit the sale of respondent's products. The foregoing sentence shall not be construed as a limitation on respondent's submission of additional information regarding the request to reopen, including information on the financial impact of Paragraph II(D) on respondent. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. Respondent may continue to use the business card, as described by this proviso, during the time that a request to reopen these proceedings pursuant to this Paragraph is pending, and, if such proceedings are reopened, until the Commission determination of the matter has become final. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

4. **Paragraph II(E) shall be amended by striking the words "to direct each such person to read the information contained on such card." The amended Paragraph shall read:**

E. Failing to give the card, required by Paragraph II(D), above, to each person and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

IT IS FURTHER ORDERED, That the foregoing modifications shall become effective upon service of this Order.

IT IS FURTHER ORDERED, That in all other respects, respondent's other requests are denied.

By Direction of the Commission.

SEAL

Carol M. Thomas
Secretary

APPENDIX E

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Michael Pertschuk, *Chairman*
Paul Rand Dixon
Elizabeth Hanford Dole
David A. Clanton

In the Matter of GROLIER INCORPORATED, a corporation.	Docket No. 8879 Issued: March 13, 1978

OPINION OF THE COMMISSION

BY DOLE, COMMISSIONER:

Grolier, Inc. and its wholly-owned subsidiaries,[1] [hereinafter referred to as "respondent"] appeal from the initial decision of Administrative Law Judge Theodor P. von Brand that certain of respondent's practices violated Section 5 of the Federal Trade Commission Act. Complaint counsel have filed a cross-appeal.[2]

Respondent is engaged in the publication and distribution of encyclopedias, other reference works and services, training courses, and teaching machines. Respondent sells its products door-to-door as well as through mail solicitations. Its products have included Encyclopedia Americana, Encyclopedia International, New Book of Knowledge, World's Greatest Classics,

[1] American Peoples Press, Inc., Americana Interstate Corp., Career Institute, Inc., Grolier Enterprises, Inc., Grolier Reading Programs, Inc., Americana Corporation, Spencer International Press, Inc., The Grolier Society, Inc., R. H. Hinkley Co., Grolier New Era Corp., The Richards Co., Inc., Madison Enterprises, Inc., Grolier Interstate, Inc., and Federated Credit Corp. were named as respondents and found by the Administrative Law Judge to be wholly-owned corporate subsidiaries of respondent Grolier, Inc. *See* I.D. Findings 2-15.

[2] For convenience, the following abbreviations are used in this opinion:
I.D.—Initial decision of the administrative law judge;
Tr.—Transcript of testimony;
CX—Commission exhibit.

Book of Popular Science, and Children's Hour.[3] Both door-to-door selling and mail order solicitations account for substantial sales volume.[4]

On the basis of an extensive hearing record, the law judge sustained the complaint allegations that respondent has engaged in a host of deceptive and unfair practices. We agree with his determination that respondent has violated Section 5. Like the appeals before us, this opinion is directed mainly to the rather technical issues raised by the judge's proposed order to cease and desist.

The law judge's findings deal with respondent's personnel recruitment activities, sales and promotion practices, and debt collection procedures. With respect to personnel recruitment he found, *inter alia*, that respondent misrepresented that the jobs offered were non-selling positions and that the conditions placed upon salary or income guarantees were not disclosed to job applicants.[5] He also determined that respondent employed a variety of deceptive sales and promotional practices. For example, he concluded that respondent misrepresented the regular retail price of its products. Furthermore the judge found that respondent had misrepresented to consumers the purpose of in-home sales presentations.[6]

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[3] Respondent has also sold products not published by Grolier, Inc. These include the Harvard Classics, The Bible, and the Hammond Atlas. *See* I.D. Finding 90.

[4] In 1969 respondent's door-to-door sales were $70,000,000 while mail order sales of certain subsidiaries accounted for $41.5 million. In 1970, sales door-to-door accounted for $63.4 million while mail order volume was $49 million. In 1972, mail order volume exceeded door-to-door sales by $63 million to $35.3 million, respectively. *See* I.D. Findings 16 and 17.

[5] *See* I.D. Findings 60-88.

[6] *See* I.D. Findings 114-132. In addition, the judge found that the salesmen of respondent Spencer International Press, Inc., in approaching parochial school principals, had misrepresented that they were from the "National Catholic Educator's Association" and that respondent Spencer's promotional packets, printed with a "bold cross in the upper left hand corner," as well as its follow-up phone talks and sales presentation had the capacity to lead parents to believe that the product had been endorsed by the parochial school or the archdiocese. *See* I.D. Finding 91-101. Respondent, The Richards Company, Inc., according to the law judge, distributed to its salesmen a picture of Pope Paul with the American People's Encyclopedia, although the Holy See had not endorsed the encyclopedia for commercial purposes. *See* I.D. Finding 184. Judge von Brand also determined that a letter written in 1953 by the President of the University of Notre Dame concerning a 1953 encyclopedia edition was used by respondent Spencer as promotional material, after the date had been removed, as late as 1969-70. *See* I.D. Finding 185.

The administrative law judge's order places respondent under a number of prohibitions and requires respondent to take certain affirmative actions. The order is directed to respondent's personnel recruiting practices, debt collection procedures, promotions aimed at schools to obtain entry to students' homes, misrepresentations as to the purpose of salesmen's calls and payment plans, misleading pricing claims and offers of free goods, and other unfair or deceptive advertising practices.

Liability

While respondent addresses its appeal, in the main, to selected provisions of the judge's order, it also contends that the evidence adduced by complaint counsel at the hearing in this matter compels a dismissal of all counts of the complaint. *See* Respondents' Appeal Brief at 3. We find no merit in this argument or in respondent's alternative argument that complaint counsel's evidence of Section 5 violations was *de minimis*. We have carefully reviewed the record in light of the initial decision and have found ample evidence to support the judge's findings. Respondent also contends that the evidence is insufficient to hold it accountable for any deceptive recruitment, sales or debt collection practices of its employees. We reject this contention. It is well settled that firms cannot avoid the requirements of Section 5 by passing off responsibility for deception to their employees. As the court stated in *Parke, Austin Lipscomb, Inc.* v. *FTC*, 142 F.2d 437, 440 (2d Cir. 1944), "[H]owever unauthorized the offending conduct of the salesmen may have been and however condemned and discouraged by their superiors, it still was conduct which subjects the employers to the jurisdiction of the Commission and its cease and desist order." *See Goodman* v. *FTC*, 244 F.2d 584 (9th Cir. 1967). In any case, the record indicates that respondent initiated several of the illegal practices. We, therefore, adopt the judge's findings and conclusions, except to the extent that they are inconsistent with the findings and conclusions set forth in this opinion.

Order Provisions

I. DECEPTIVE RECRUITMENT PRACTICES

The judge's order requires respondent in recruitment advertisements to disclose that prospects will be hired to sell encyclopedias on an "in-home" basis.[7] The provision is based on the judge's finding that respondent recruited its door-to-door encyclopedia salesmen by affirmatively misrepresenting that the positions offered were in public relations work, marketing and promotions, sales administration and management.[8] Although phone numbers were listed in respondent's recruitment advertisements, it was respondent's policy not to disclose over the phone the nature of the employment offered.[9] While some applicants were informed during their initial interview that the position involved encyclopedia sales,[10] other recruits did not realize that until training was actually in progress or had been completed.[11] In some instances recruits were explicitly told that the jobs did not involve selling.[12] Under these circumstances, the order provision requiring respondent to disclose in advertising that it is recruiting "encyclopedia salesmen" is necessary to prevent a continuation of the type of deception which has misled job applicants in the past.[13]

Respondent asserts that a simple "help wanted" ad would be in violation of the order,[14] and that an ad that includes no more than a telephone number does not mislead.[15] Respond-

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[7] Respondent argues that the evidence establishes only unauthorized and infrequent recruiting violations and that therefore no order provisions relating to recruitment should be included in the order. The administrative law judge, however, correctly found that respondent's recruitment advertisements frequently and affirmatively misrepresented that the positions offered were non-selling in nature, *see* I.D. Finding 60; that "management trainee" recruits were in fact hired to work as door-to-door salesmen, *see* I.D. Finding 67; and that respondent frequently advertised compensation guarantees for the positions offered without disclosing the conditions which applicants would be required to meet in order to receive the guaranteed compensation, *see* I.D. Findings 68 and 70.

[8] *See* I.D. Finding 60.

[9] *See* I.D. Finding 63.

[10] *See* I.D. Finding 73.

[11] *See* I.D. Finding 75.

[12] *See* I.D. Finding 76.

[13] See Order Paragraph I (C).

[14] *See* Respondents' Appeal Brief at 52.

[15] *See* Transcript of Oral Argument at 14 (remarks of Mr. Furth).

ent contends that an affirmative disclosure that the sole job responsibility is to solicit and sell encyclopedias in the home will effectively preclude recruitment advertisement.[16] However, in view of the affirmative misrepresentations as to the nature of the job which have been made both in advertising and at the initial interview, we conclude that the affirmative disclosure required by the order is justified.

The law judge required[17] that certain paragraphs of the order[18] be furnished to applicants at the initial face-to-face interview. Respondent argues that it should be permitted, instead, to furnish the applicant with a summary of the order. The order does not preclude respondent from furnishing a prospective employee with an accurate explanation of the order, orally or in writing. The Commission has determined, however, not to modify the requirement that respondent furnish copies of the pertinent provisions specified. *See Encyclopedia Britannica, Inc.*[19]

II. Deceptive Sales and Promotion Practices

Respondent objects to the judge's order requirement that its sales representatives present a three inch by five inch card at the time admission is sought into the home for the purpose of soliciting sales. Respondent's representatives must direct the consumer to read the information contained on the card. The card discloses the name of the corporation, the name of the sales person, and the term "ENCYCLOPEDIA SALES REPRESENTATIVE" (or reference to other applicable product).

The record shows that respondent's sales representatives failed to disclose and have misrepresented the purpose of the in-home visit in both telephone calls to consumers and in door-to-door canvassing.[20] As Judge von Brand concluded:

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[16] *See* Transcript of Oral Argument at 14 (remarks of Mr. Furth). We note, however, that respondent's President and Chairman of the Board, Mr. Murphy, testified at the hearing that he would be amenable to a statement in recruitment advertising that the job involved direct selling in the home, *see* Tr. at 16458, and that on occasion he would be willing to disclose in advertising that the products to be sold were encyclopedias. *See* Tr. at 16459.

[17] Order Paragraph I (E).

[18] Paragraphs I, II and V.

[19] 87 F.T.C. 421, 528 (1976), *appeal pending*, No. 76-1477 (7th Cir.).

[20] *See* I.D. Finding 108-130.

> The purpose of respondents' sales representatives' contact, which is to sell, is a material fact in a prospect's decision to let such representative into [his] home. The failure to disclose at the outset, and in many instances, to affirmatively misrepresent, the purpose of contacting prospective customers was false, misleading and deceptive.[21]

Respondent's assertion that instances of deception-at-the-door "are clearly isolated and untypical examples of individual sales representatives acting in contravention of respondents' corporate policies" [22] is contradicted by the record.[23] Both the sales manual issued under the letterhead of The Grolier Society, Inc. Publishers[24] and distributed to the company sales representatives,[25] as well as respondent Spencer's manual, instruct salesmen to affirmatively misrepresent the purpose of the in-home visit.[26]

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[21] I.D. Finding 132 (citation omitted). A similar requirement was included in the Commission's order in *Encyclopaedia Britannica, supra* 87 F.T.C. at 524, 527.

[22] Respondents' Appeal Brief at 56.

[23] *See* CX 419, Tr. at 664, 693-95 (testimony of Mr. Romano); CX 651A-C, Tr. at 5662-63; I.D. Finding 136.

[24] CX 563(a).

[25] *See* Tr. at 2836-38 and CX 563(a).

[26] "Hello, Mr./Mrs. blank, blank, blank? My name is blank, blank, blank, and I'm with the Grolier Society. I don't know whether that name means anything to you but Grolier is the world's largest publisher of educational reference books. We actually publish 20 different sets of Encyclopedias—but please do not be alarmed Mr./Mrs. blank, blank, because *I didn't call you to give you a sales talk!* The purpose of my call is this:

> "Grolier has approximately 7,000 sales people across the country and we have to provide these sales people with prospects to call on. Right now we are getting some help from several families in each community and in return for that help we are paying these families in Grolier merchandise . . . .
>
> "Notes: If prospect says they won't be home then set it up for tomorrow night—or for Sat. and Sun.
>
> "If prospect says they are not interested—say 'That's fine—all I want to do is explain what we are doing and like I said I am not coming out there to give you a sales talk.'"

CX 563(i) (emphasis in original)

Telephone talk number II makes the same affirmative misrepresentation. *See* CX 563(o).

Respondent Spencer International Press, Inc. likewise utilized a training manual which contained both a "door approach" and "telephone talk" that

Footnotes continued on following page

It is clear from the in-home presentation talks set forth in the manuals that the purpose of the in-home visit is to sell the company's products.[27] Indeed, the instruction accompanying one of the telephone talks points out that "when you have an appointment you take your samples with you." [28]

Respondent has argued that the Commission should not mandate the exact disclosures to be made. Each of the

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Footnotes continued from preceding page

misrepresented the purpose of the in-home visit. *See* CX 871-F; CX 871-V; I.D. Finding 100. The training manual instructed the sales representative to:

> FOLLOW PRESENTATION *Do not deviate*—it must be done our way, which is the successful way.

CX 871-B (emphasis in original). The door approach set forth in the training manual is as follows:

> Hi, I wonder if you could give me some information? (wait for reaction)
>
> I'm conducting a series of special interviews in the _____ area this evening and I was supposed to ask you and the Mrs. a couple of questions. (show questionnaire) By the way my name is _____. (Hold out hand) Do you mind if I step in? (If ques. use follow up. Also when known, use family name)

CX 871-F.

The Telephone Talk represents the home visitor as an "instructor" in programmed learning:

> Hello. Is this Mrs. _____? Good! This is Mr. _____ calling from the Catholic School Division of Programmed Learning. I'm calling in reference to the announcements the children took home from *(Name)* School. (Pause.) You probably remember it. As you know, we agreed to give each family a free demonstration on programmed learning as a public service. And the reason I'm calling now is that our instructors will be in the *(Name)* area tonight. I thought I'd call first to make sure both you and Mr. _____ will be in this evening. It takes about 10 minutes, since each instructor sees about 6 or 7 families an evening . . . . .

CX 871-V.

Judge von Brand found that certain of respondent's documents contain directives that full disclosure be made of the identity of the callers and the purpose of the call. He found further that these documents reflected the company's "official policy." *See* Finding 126. We disagree. This label is inconsistent with the evidence in the record and with other findings of the administrative law judge. *See, e.g.*, Finding 129. Accordingly we have modified Finding 126 by deleting the statement that "respondents' official policy prohibited misrepresenting to a prospective customer the purpose of a telephone call or home visit."

[27] *See* CX 563 J-K; CX 871 P-T.

[28] CX 563-I and O.

> "You have now prepared your prospects for the next step which is the presentation of products. *Do not* ask them if you can go get your samples. *Do it!!*" CX 563-K.

disclosures required to be included on the card however is necessary to prevent future violations. While respondent might be allowed to make undefined, "appropriate" disclosures, such an order provision would inject unnecessary uncertainty into respondent's compliance obligations.

Respondent also suggests as an alternative to the 3x5 card the use of a normal size business card. However, if all of the necessary information were included on a business card the print would be so small that the disclosure would be unintelligible. Moreover, business cards are normally accepted for purposes of future reference, whereas the purpose of this requirement is to encourage the consumer immediately to refer to the card so that he will be placed on notice that the caller is there for the purpose of selling him a set of encyclopedias.

We are not persuaded by respondent's argument that the "notice to consumer" provisions of the order are unjustified. This portion of the order requires that lead-gathering advertising which, for example, invites participation in a contest, contain a disclosure that consumers who respond may be contacted by a salesperson for the purpose of selling the applicable products. As the judge concluded, respondent's lead-generating advertising failed to disclose this material fact.[29] Furthermore, certain of the advertising in question creates the impression that the consumer who responds to an offer of free information will receive delivery by mail and will not be subjected to a salesman's call.[30]

With respect to the proposed disclosure in the lead-getting material respondent objects to the requirement that it be placed in ten point bold face type and also renews its argument that

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[29] *See* I.D. Finding 105, I.D. p. 149.

[30] The copy at the end of respondent's "Uncle George" ad, CX 1614-H, states:

> Now we've run out of space, but we would like to tell you more. So please send for our free brochure. The coupon below will bring it . . . .

The coupon which the customer is requested to send in states in part:

> Gentlemen:
>
> I am interested and would like to know more. I understand there's no charge and no obligation. . . .

Ibid. *See* CX 1614-G.

the Commission should not prescribe specific language.[31] We find that it is necessary to place this important language in ten point bold face to assure that the consumer will be apprised of the message. The proposed language includes a disclosure that the consumer may be contacted by a sales representative for the purpose of selling the applicable product. There is no question that the main purpose of respondent's sales representatives in contacting persons at their homes is to sell its products. Any other assertion or inference would be deceptive.

We turn now to respondent's objections concerning the pricing provisions of the order.[32] Respondent's contract adjoining the retail price list, states that "a combination purchase of two or more of the products shown in bold face automatically entitles the customer to an approximate 30% price advantage from the individual prices. If, however, you purchase just one product you pay the full price shown."[33] The prices listed for the designated publications, however, are not the prices at which significant numbers of sales are made.[34] They represent the prices charged when the products are sold on an individual basis and sales of individual publications constitute only a small percentage of respondent's sales.[35] The law judge found that the sales representatives are frequently not even authorized to make individual sales of the publication or are discouraged from doing so. Respondent's sales representatives are trained instead to sell the products in combination, and respondent distributes standard combination schedules to its respective sales representatives which set forth the various publications included in each combination as well as the price of each

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[31] Order Paragraph II (A) requires the following disclosure in lead-gathering advertising.

> NOTICE TO CUSTOMER—PERSONS WHO REPLY AS REQUESTED MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

Order Paragraph II (B) requires a similar disclosure on the coupon used to respond to the advertisement.

> NOTICE TO CONSUMER—PERSONS WHO RETURN THIS [insert name of applicable device] MAY BE CONTACTED BY A SALESPERSON FOR THE PURPOSE OF SELLING [insert name of applicable product].

[32] Order Paragraphs II (M) and (S).

[33] I.D. Finding 158.

[34] I.D. Findings 158 and 160.

[35] I.D. Finding 157. *See* I.D. Finding 89.

combination.[36] We take the title "retail price list" to be tantamount to a representation that these are regular prices at which the designated publications have been sold. In view of the fact that the publications were only rarely sold at these prices, the list deceptively represented to consumers that cost savings could be realized through combination purchases.[37]

The order recommended by the judge, therefore, prohibits respondent from representing a price for a product as its regular retail price unless substantial sales are made at the level represented as the regular price. In addition, the order requires that respondent attach to each contract a list of all products and

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[36] *See* I.D. Findings 89, 157-58. Indeed, beginning in late 1973 respondent added a statement to the retail price list which disclosed that "only a small fraction of Grolier's sales of any of these products is on an individual basis." I.D. Finding 158.

[37] We uphold the order provisions which address respondent's "continuity programs" and other methods of selling its products by mail on an approval basis. Under the "continuity programs" respondent would ship the first three volumes of a set singly, at intervals, but transmitted the balance of the set in one shipment unless the customer had tendered a timely notice of cancellation. The judge found that respondent failed to disclose that a bulk shipment of the remaining volumes would be made after shipment of the first three volumes. *See* I.D. Finding 230 and I.D. p. 166. Respondent argues that these order provisions are unwarranted since, prior to the issuance of the Part III complaint in this matter, it followed a policy of "full disclosure" of shipment sequences. However, the Commission has been "parsimonious, if not totally unyielding, in its adjudicative recognition of the defense of abandonment, the courts have been reluctant to vacate Commission orders on those grounds except in the most extreme circumstances not present here, such as where a corporate respondent had existed from the relevant lines of business under circumstances in which reentry seemed improbable." *See Fedders Corp.*, 85 F.T.C. 38, 72 (1975), *aff'd*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

In addition, respondent contends that the testimony of customers called by complaint counsel was not sufficient to support this portion of the order. Respondent's arguments are untenable. Moreover, as the administrative law judge observed:

> "Respondents also represented that persons joining or participating in such programs do so at no risk or obligation. However, participating in such continuity programs did entail certain risks and obligations. Consumers were subject to the risk of receiving a bulk shipment if the negative option provided by respondents was not successfully exercised. If books were not wanted, the consumer had to reject them and do so within the allotted time. If a timely notice of cancellation was not received due to delays in the mail, they risked being billed for publications even after such publications had been returned. I.D. p. 166.

services and, in immediate conjunction thereto, the actual selling price pursuant to the "substantial" sales standard. The price list will enable the contracting consumer to judge whether the offer is a bargain—to compare the contract with the authorized list prices and determine whether or not any savings claims are true. *Encyclopaedia Britannica, supra.*[38]

Complaint counsel advocate the adoption of an order provision which would prohibit respondent from representing that a price is a regular retail price unless, for the previous 6 month period, at least 30 percent of its sales for that product have been made at the price, or a higher price. As in *Encyclopaedia Britannica*[39] we are not persuaded that the order should depart from the Commission's guides on deceptive pricing, 16 C.F.R. § 233, which provide, *inter alia*, that the retail price may be described as a selling price if "substantial" sales are made at the retail level.

Both respondent and complaint counsel object to Paragraph V of the proposed order. In essence Paragraph V requires respondent to furnish each person engaged in the promotion, distribution and sale of respondent's products and services, including independent contractors (distributors), with a copy of the order; to obtain a signed statement from each person declaring his intention to conform his business practices with the requirements of the order; and to cease doing business with each person who will not so sign. Respondent points to certain findings in the initial decision that respondent neither controlled nor was responsible for the actions of distributors.[40] For example, when respondent, The Richards Company, withdrew from direct sales, most of the company's key sales personnel became distributors.[41] While respondent furnished assistance to the former Richards employees in helping them become distributors,[42] the law judge concluded that

[38] 87 F.T.C. at 529.
[39] *Id.*
[40] *See* I.D. Findings 276-288 and I.D. p. 172.
[41] I.D. Finding 282.
[42] *See* I.D. Findings 283-86.

> [b]y and large, . . . the contacts between respondent's officials and these distributors are not inconsistent with a finding that they were normal business communications such as may be expected of any manufacturer and his outside retailers. On balance, the evidence does not sustain a finding that respondents controlled or are responsible for the actions of such distributors.[43]

Complaint counsel, while conceding that Paragraph V should not apply to wholly independent distributors whose only connection with respondent is the purchase of books for resale to consumers, contend, nevertheless, that independent distributors who maintain a significant connection[44] with respondent should be subject to this order provision. Complaint counsel argue that there is a "very real possibility that the respondents will attempt to do, through distributors, what the Order prohibits them from doing directly."[45] We are not persuaded that it is necessary to include independent contractors within the purview of Paragraph V, and we have modified the order accordingly.[46] Should the violations addressed in these proceedings be practiced by persons other than respondent's salesmen or agents, the Federal Trade Commission Act[47] affords sufficient means of proceeding against the alleged offenders.[48]

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[43] I.D. p. 172.

[44] Complaint counsel would apply Paragraph V to persons or entities: (1) receiving direction, control or approval from respondent for sales practices; (2) receiving promotional materials or sales aids from respondent; or (3) receiving financing from respondent for any contracts procured.

[45] Answering Brief of Counsel Supporting the Complaint at 54.

[46] *Compare Housewares, Inc.*, Docket No. 8733, Opinion and Final Order (November 19, 1977). There, respondent Emdeko developed and refined an illegal "package selling scheme" and actively promoted its adoption by distributors. Unlike *National Housewares*, respondent cannot be said to be "active participants in the illegal practices," *id.* at 18-19 (slip opinion), of the distributors. Now would its conduct subject it to liability "closely akin to the liability of a contributing 'tort feasor.'" *id.* at 13 (slip opinion).

[47] 15 U.S.C. § 45(m)(1)(B).

We also note that other portions of the order place restrictions upon possible attempts by the respondent to accomplish, through distributors, what the order prohibits it from doing directly. *See* Order Paragraph 1(F).

[48] The judge's order requires that respondent furnish the Commission with the names of the independent distributors with whom it does business and we adopt this provision. In addition, we will require respondent to furnish the addresses of its independent distributors and have modified Paragraph V accordingly.

Procedural Issues

As the final matter, we now consider respondent's procedural arguments. Respondent reasserts in its appeal a claim which the Commission has dealt with previously in this proceeding, that Judge von Brand should have been disqualified from conducting the hearing. The Commission concluded in its prior order addressing this issue[49] that Judge von Brand would not be subject to disqualification even if it could be shown that, while serving as attorney advisor to Commissioner MacIntyre, he advised the former Commissioner on matters pertaining to respondent. Respondent has marshalled no additional arguments in its briefs which dissuade us from this view.[50] Respondent asserts that "an attorney advisor bears an ethical responsibility as stringent as that of the Commissioners themselves"[51] and therefore that Judge von Brand should be disqualified. The fallacy in respondent's argument is that the Federal Trade Commission Act provides for participation by Commissioners in both the investigative and the adjudicative stages of a proceeding.[52] Section 554(d) of the Administrative Procedure Act explicitly recognizes the dual role of "members of the body comprising the agency"; that legislation specifically authorizes a member's participation in both the investigative prosecutorial function and the adjudicative decision-making process.

Respondent also appeals the denial of its motion to dismiss or stay the adjudicative proceedings and contends that the Commission should proceed by way of an industrywide trade regulation rule. It argues that while a principal competitor[53] is subject to similar affirmative relief provisions, other competitors are not.

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[49] 87 F.T.C. 179 (1976).

[50] In conjunction with respondent's arguments as to disqualification of the law judge, respondent contends that the Commission was in error in denying discovery of certain documents reasonably calculated to lead to evidence concerning contacts between the Commissioners and the respondent during the period in which Judge von Brand was an attorney advisor. We reaffirm our ruling. 87 F.T.C. at 180-81.

[51] Transcript of Oral Argument at 6 (remarks of Mr. Furth).

[52] *See* 15 U.S.C. §§45(b) and 49.

[53] *Encyclopaedia Britannica, supra.*

While rulemaking would not necessarily be inappropriate in this circumstance, it is well established that the Commission may proceed by adjudication against an alleged offender without simultaneously pursuing all others. *Moog Industries* v. *FTC*, 355 U.S. 411, 413 (1958). The Commission, of course, does not have "unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry." *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967). However, respondent has not substantiated its claim that the order provisions would cause substantial economic injury to its business. The record in this case demonstrates egregious violations of the Federal Trade Commission Act and the order imposed by the Commission is reasonably related to the violation and necessary to correct these abuses.[54]

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[54] Respondent's claim of "fundamental unfairness" as to the card-at-the-door and the advertising and promotional disclosure provisions is without merit.

We also reject respondent's contention that it was error for the administrative law judge to deny respondent's request to call as a witness a former director of the Commission's Office of Policy Planning and Evaluation. Respondent sought his testimony with respect to whether or not alternative relief provisions might be incorporated in the order which were "less drastic" than those proposed by the law judge. We cannot find that the judge abused his discretion in denying this request.

We uphold the administrative law judge's determination to deny discovery of an internal staff memorandum, entitled "Analytical Program Guide for the Direct Selling Industry", and related documents. Respondent sought the memorandum to support its assertion that the Commission has prejudged this proceeding, upon the basis of "secret evidence and secret law." Respondent's Appeal Brief at 38. The Commission's determination and its order in this matter rest solely upon the record compiled in Docket No. 8879. *See Encyclopaedia Britannica, Inc.*, 87 F.T.C. 378 (1976).

Also without merit is respondent's argument that it was error to deny it access to the total number of complaints and the subject matter of each complaint received from its customers by the Federal Trade Commission. The complaint information is relevant, according to respondent, to the formulation of appropriate relief. Specifically, respondent would seek to show "if negligible consumer injury or dissatisfaction has resulted from the practice which the particular form of relief is designed to rectify." Respondents' Appeal Brief at 39. The administrative law judge noted that the presence or absence of consumer complaints is of marginal utility in the formulation of the order provisions. Moreover, as stated by the law judge in denying discovery of the complaint information, the request was made "at a late stage of the proceeding . . . in the midst of trial." His denial of respondent's request for complaint information cannot be said to constitute an abuse of discretion.

Having considered the arguments of respondent and complaint counsel in this matter, we have determined that the public interest is best served by the issuance of the appended order [not included in this Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit].

APPENDIX F

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: David A. Clanton, *Acting Chairman*
Paul Rand Dixon
Michael Pertschuk
Patricia P. Bailey

In the Matter of GROLIER INCORPORATED, a corporation, *et al.*	Docket No. 8879 Issued: August 13, 1981

ORDER DENYING MOTION TO DISQUALIFY JUDGE VON BRAND

This matter is before us once again on Respondent's Motion for Disqualification and Removal of the Administrative Law Judge ("Renewed Motion"). Grolier was given the opportunity to raise this issue a second time when the United States Court of Appeals for the Ninth Circuit remanded the case because it believed that there was an erroneous "flat refusal" by the Commission to disclose to Grolier anything at all about Administrative Law Judge von Brand's prior participation in the Grolier case while he served as an attorney-advisor to former Commisioner MacIntyre. *Grolier, Inc.* v. *FTC*, 615 F.2d 1215, 1222 (9th Cir. 1980).

The Commission denied Grolier's discovery request when it held that, as a matter of law, attorney-advisors were not engaged in investigating or prosecuting matters so as to bring them within the proscription of Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. §554(d). See *Grolier, Inc.*, 87 F.T.C. 179, 181 (1976). The Ninth Circuit held however that Section 554(d) precluded attorney-advisors to the Commissioners "from [subsequently] participating in the adjudication of cases [as administrative law judges] in which

they have actually performed . . . ['investigative and prosecuting'] functions, and in 'factually related cases,'" and stated that "[o]nce an attorney-advisor is shown to have been 'engaged in the performance of investigative or prosecuting functions,' through prior acquaintance with *ex parte* information, 554(d) says he 'may not . . . participate or advise in the decision . . . .'" *Id.*, 615 F.2d 1221. The Ninth Circuit therefore held that Judge von Brand's "actual involvement" with "information received outside of the controlled adjudicative setting" (615 F.2d 1220, 1221) was the critical determination to be made on disqualification. The court remanded the case for us to reconsider the denial of discovery and thereafter the disqualification motion.

Since the case was remanded, Grolier has made extensive submissions, mostly consisting of documents from the Commission's files, which it had prior to the Ninth Circuit's decision. Despite directions to Grolier to state the impact these documents might have on the disqualification issue,[1] Grolier has presented only a recast version of an argument previously rejected by both the Commission and the court of appeals. Although advanced at length, the argument is simply that because Judge von Brand served as an attorney-advisor he is presumed to have a close relationship with his Commissioner and further presumed to be aware of everything circulated among the Commissioners[2] and, because the Commission considered several matters involving Grolier while he was an attorney-advisor, Judge von Brand must be presumed to have been exposed to information outside of the controlled adjudicative setting and, hence, disqualified. See Renewed Motion. Grolier also argues that, although the Commission has searched its files thoroughly and repeatedly for relevant material, Grolier is entitled to further discovery because it is still unable to connect Judge von Brand with any prior Grolier matter. We shall address these issues after a brief review of the history of this matter to put Grolier's present arguments in perspective.

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[1] Order Reopening Proceeding and Directing Submission of Further Information, September 12, 1980.

[2] The argument has apparently escalated because now Grolier would charge Judge von Brand with knowledge of every document possessed by the staff even though there is no indication it was previously seen by the Commissioners. *E.g.*, Renewed Motion, 7, 8; Johns Affidavit, Exhibits D-F, I; Righthand Affidavit, Exhibits I and M; see footnotes 12 and 13, *infra*.

History of the Disqualification Motion

Judge von Brand served as an attorney-advisor to Commissioner MacIntyre from 1963 to 1970. The Commission issued its complaint against Grolier on March 8, 1972.[3] Hearings on the complaint extended from 1973 to 1976 and were conducted before two Administrative Law Judges.[4] Judge von Brand's prior role at the Commission was related in a Commission press release announcing his appointment as a judge on March 18, 1975, and reported in the Antitrust and Trade Regulation Reporter on March 25, 1975 (706 ATRR 32, 33) (R. 3301-02). The first prehearing conference before Judge von Brand was held on March 19, 1975. *Id.* Judge von Brand reheard much of the testimony at Grolier's insistence (R. 1804-29, 1967-81). Almost a year later, just five days before the end of hearings before Judge von Brand, Grolier's president testified that Commissioner MacIntyre may have met with him in 1966 or that he may have met Commissioner MacIntyre.[5] Judge von Brand immediately disclosed that he had worked for Commissioner MacIntyre but stated that he had no recollection of any events involving Grolier.

Armed with this bit of testimony Grolier filed a motion to disqualify Judge von Brand along with a discovery request for all documents relating to Grolier which were before the Commission during the period from 1963 to 1971. Judge von Brand entered a statement in the record pointing out that his former position had been a matter of public (and published) record since he presided over the case; that he had no recollection of

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[3] The original record revealed, in affidavit form, the undisputed fact that the recommendation to issue a complaint, based on the results of the staff's investigation, was not forwarded to the Commission until *after* Judge von Brand left Commissioner MacIntyre's office. R. 4663-64. Exhibit BB to the Righthand Affidavit indicates that the Commission was advised that the investigation was progressing while Judge von Brand was an attorney-advisor. Nothing in the record or in Commission practice indicates that the Commission knew the substance of the information Grolier provided at that time to the investigatory staff.

[4] The first judge assigned to hear the case retired after a year of hearing had been held (R. 1973).

[5] The actual testimony was: "I only recall having met Mr. MacIntyre and I don't remember, or I think, I am quite sure at one of the earlier discussions with the Chairman he was there, but it was a very informal discussion just trying to say who I was and where I hoped to be able to take the company in the following 20 years." (Tr. 16115).

working on Grolier matters; that he had asked a former secretary to search Commissioner MacIntyre's former suite of offices for any records relating to Grolier; that no such records were located nor were there any logs that would show who worked on any particular matter, and that he had searched his own files and could find nothing related to Grolier in them. Statement of Administrative Law Judge Concerning Motion for Disqualification, January 30, 1976. On February 10, 1976, the Commission declined to disqualify Judge von Brand and denied discovery. *Grolier, Inc.*, 87 F.T.C. 179 (1976).

On April 30, 1976, Grolier replicated its discovery motion for documents in a Freedom of Information Act ("FOIA") request. On May 17, 1976, the Secretary of the Commission granted the request in part and denied it in part. Grolier appealed this determination to the Commission. On June 28, 1976, the Commission granted Grolier access to most of the documents but withheld, in whole or in part, 41 documents. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission"), Exhibit A, paras. 26-29; Exhibit C. On August 20, 1976, Grolier filed a lawsuit under FOIA to obtain the 41 documents withheld. *Grolier, Inc.* v. *FTC*, Civil Action No. 76-1559 (D.D.C.). On November 1, 1976, an affidavit and a index of the 41 documents withheld were filed by the Commission. Submission, Exhibits B and C. On May 6, 1977, the Commission responded to interrogatories propounded by Grolier about the nature of the Commission's search for documents and about how Commission records are maintained. Submission, Exhibit D. On July 22, 1977, the district court ordered an additional search for documents which was conducted with negative results. Submission, Exhibit E. On March 10, 1978, the district court granted summary judgment for the Commission, holding that the documents withheld were exempt from production under FOIA. Submission, Exhibit F. Grolier appealed. Then, because the District of Columbia Circuit had changed its interpretation of the status of Commission "blue minutes," [6] the Commission sought a remand. On remand the Commission, on March 13, 1979, voluntarily released 11 of the 14 blue minutes in their entirety. Minor deletions were made in the three

[6] *Bristol-Myers Co.* v. *FTC*, 194 U.S. App. D.C. 285, 598 F.2d 18 (1978).

remaining minutes. Submission, Exhibit G. The district court subsequently ordered the release of all the blue minutes. Submission, Exhibit H. Grolier again appealed.[7]

Meanwhile, in the adjudicative proceeding, Judge von Brand issued his initial decision on October 12, 1976. *Grolier, Inc.*, 91 F.T.C. 331 (1978). Grolier appealed this decision to the Commission which issued a Final Order and Opinion on March 13, 1978. *Grolier, Inc.*, 91 F.T.C. 476 (1978). Grolier did not attempt to use the documents it obtained in June 1976, or the Index describing the withheld documents it obtained in November 1976, when it made its disqualification and discovery arguments to the Commission and the court of appeals.

On remand from the Ninth Circuit Judge von Brand has executed an affidavit reaffirming that he has no recollection of working on Grolier matters as an attorney-advisor. In view of the time period involved and the volume of documents that passed through Commissioner MacIntyre's office, he cannot positively say he never saw a circulation relating to Grolier. Judge von Brand also relates conversations he had with a former secretary to Commissioner MacIntyre and the Commissioner himself and states that both recall that another attorney-advisor, Mr. Powers (now deceased), worked on Grolier matters. Judge von Brand also describes searches he made for records that might show his involvement with Grolier matters. First, he searched his personal files and found nothing related to Grolier. Second, he had another former secretary search Commissioner MacIntyre's former suite of offices for Grolier related documents or anything that would show which attorney-advisor worked on Grolier matters. The results were negative. Finally, he directed the Secretary of the Commission to search the Grolier files for anything that would show whether he had prepared documents related to Grolier. Again, nothing was found. Affidavit of Theodor P. von Brand.

Commissioner MacIntyre has also filed an affidavit stating that he compartmentalized work assignments in his office. He assigned investigational matters to Mr. Powers and, after his departure, to Mr. Volhard. Motions were assigned to Mr.

[7] The appeal was dismissed after the Commission released all the documents in this proceeding. See Order, March 10, 1981.

Michaels and adjudicatory matters were assigned to Judge von Brand. To the best of his recollection, Commissioner MacIntyre did not discuss matters relating to Grolier with Judge von Brand and he was not aware that Judge von Brand had contact with any Grolier matters as an attorney-advisor. Finally, Commissioner MacIntyre states that all his official files remained in his office when he left the Commission, that the personal files he removed have since been destroyed and that he has no documents related to Grolier now. Affidavit of Everette MacIntyre.

Finally, although none of the 28 documents withheld in the FOIA case shed any light on Judge von Brand's involvement with Grolier matters, we provided them to Grolier as a matter of discretion. Order, March 10, 1981.

Further Discovery is Unnecessary

Grolier again contends it is entitled to discovery beyond its original request for documents and that if this discovery is denied an adverse inference must be drawn against Complaint Counsel. Renewed Motion, 18-27. No further discovery is necessary. Our March 10, 1981, Order in essence granted Grolier's original request for documents but rejected additional requests Grolier made.[8] We are satisfied, both independently and in light of the court of appeals decision, that there is sufficient information available in the record to make an accurate determination under Section 554(d) of the Administrative Procedure Act (5 U.S.C. § 554(d)) that there is no basis to disqualify Judge von Brand.

The affidavits of the two principals, Commissioner MacIntyre and Judge von Brand, demonstrate that neither recalls discussing any Grolier matters with the other. Furthermore, both state that Judge von Brand handled only adjudicatory matters for Commissioner MacIntyre. More importantly, our files have been searched several times for any document that Judge von Brand might have seen, and a district court has approved the adequacy of some of those searches. Grolier has

[8] Grolier sought ten categories of documents and to depose Commissioner MacIntyre, Judge von Brand and three other individuals formerly employed in Commissioner MacIntyre's office.

been given every document relating to Grolier that circulated among the Commissioners while Judge von Brand served as an attorney-advisor as well as many documents that were not. Not a single document connects Judge von Brand with a single Grolier circulation.

Grolier has substantially more information than available in other cases where courts have upheld an agency decision to deny discovery on the possible disqualification of a decision-maker. For example, in *San Francisco Mining Exch.* v. *SEC*, 378 F.2d 162, contended that additional discovery had been improperly denied because it appeared that the agency had authorized the commencement of adjudication in 1962 based on a staff letter and that some decisionmakers had earlier served on the prosecuting staff of the agency (as late as July 15, 1960). The Ninth Circuit rejected the contention. It held that even if a decisionmaker had participated in investigating or prosecuting earlier proceedings, that fact would not be enough to justify additional discovery, especially because the earlier proceedings were alluded to in the opinion and thus were either in the administrative record or would have been known through official notice. The court also held that, absent a factual showing of some ground to believe that an improper commingling of functions did occur, further discovery was not appropriate. It was not enough to allege, as Grolier does here, that the decisionmaker "might have" participated in an earlier investigation or adjudication. *Id.* 378 F.2d at 170. See also, *Au Yi Lau* v. *I.N.S.*, 558 F.2d 1036, 1042-43 (D.C. Cir. 1977) (affidavit by decision-maker previously employed as prosecutor that he had "no knowledge of or familiarity with" the case in that capacity held sufficient to defeat a motion to disqualify); *Adolph Coors Co.* v. *FTC*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (affidavit by attorney-advisor that he had not participated in decision held sufficient); *R.A. Holman and Co.* v. *SEC*, 377 F.2d 655, *cert. denied*, 389 U.S. 991 (1967) (discovery and disqualification properly denied where decision-maker's affidavit stated that he had not "acquired substantial knowledge of the facts in issue," even though he had been a prosecutor when the investigation began).

Thus, it is clear to us that, under established judicial precedents, the fact that Grolier can find no indication of Judge von Brand's participation in earlier matters related to it does not mean that it is entitled to still further discovery, rather it means simply that there is no basis for disqualifying Judge von Brand. See *Grolier, Inc.* v. *FTC*, *supra*, 615 F.2d at 1221.

Grolier also argues that because we have refused to allow further discovery, an adverse inference should be drawn. Renewed Motion, 22-27. Complaint Counsel has responded by asserting that an adverse inference should not be drawn where, as here, a proper assertion of privilege is made to withhold documents. Answer to Respondent's Motion for Disqualification of the Administrative Law Judge, 3-4. Although Complaint Counsel is correct, there are other reasons not to draw an adverse inference against Complaint Counsel.

First, the adverse inference rule applies to the parties, not the deciding tribunal. Complaint Counsel is not withholding any information from Grolier. Indeed, the very case Grolier relies upon in urging that the inference be drawn, *International Union (UAW)* v. *NLRB*, 459 F.2d 1329, 1338 (D.C. Cir. 1972), holds that the inference dissipates if, as here, a decisionmaker sanctions the withholding of evidence. Second, even if an inference adverse to Complaint Counsel could have been drawn from our earlier refusal to grant discovery, it was eliminated when we provided Grolier with every document it originally sought. Finally, Grolier's argument stands the inference in its head. The Supreme Court has held that an adverse inference arises when a party provides weak evidence but refuses to produce strong evidence in its control. See, *e.g.*, *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939). Here we have given Grolier the strong evidence (every document that exists and proof that no other records exist) but it seeks to obtain weak evidence (the testimony of those who have sworn they cannot recall any involvement by Judge von Brand with Grolier matters).

In any event, if we were to infer anything from the fact that Grolier's review of all the documents before the Commission fails to establish a single connection between Judge von Brand and Grolier matters, it would be to infer not that evidence of a nexus between the two must exist, but that none exists.

There is No Basis to Disqualify Judge von Brand

Despite the tremendous volume of paper that accompanies Grolier's motion, its substantive argument for disqualification covers barely a page (Renewed Motion, 27-28) and can be summarized in a sentence. Basically, the argument is that because several matters involving Grolier were before the Commission while Judge von Brand served as attorney-advisor, it must be assumed that he saw them and that he should therefore be disqualified. With such an uncritical treatment of the issue, we could safely reject the motion by relying on the court of appeals statement that "Where [there is] . . . no evidence of actual involvement in Grolier matters by then attorney-advisor von Brand, the normal course of action would be to refuse to disqualify him." *Grolier, Inc. v. FTC, supra*, 615 F.2d at 1221. But to finally resolve any doubts on the issue, we shall discuss Grolier's specific contentions.

Grolier argues that because Judge von Brand's 1976 statement referred to the fact that he worked on adjudicative and "informal matters" there is circumstantial evidence he was exposed to anything it characterizes as an informal matter.[9] See Renewed Motion, 5, 7, 14, 16, 17, 18, 27. We reject this argument for several reasons.

First, as Complaint Counsel points out (Answer, 1-3) this argument is the same *per se* argument, advanced under another name, that the court of appeals squarely rejected. See, *Grolier, Inc., supra*, 615 F.2d at 1221.[10] Like the Ninth Circuit, we hold that "[f]or the purposes of disqualification [attorney-advisors]

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[9] Grolier argues that an earlier consent order and assurance of voluntary compliance must be considered informal matters that Judge von Brand must have seen. While these procedures are informal methods of ending investigations, both arise under Part 2 of our Rules of Practice, 16 C.F.R. § 2.1 *et seq.* governing "Nonadjudicative Procedures". As such, they would normally be handled by an attorney-advisor connected with an investigation, not adjudicatory matters.

In any event, Grolier's speculation about what Judge von Brand meant in 1976 when he said he worked on "informal matters" as well as adjudicative matters is insufficient to create a factual issue, particularly in light of the affidavits of Judge von Brand and Commissioner MacIntyre.

[10] Grolier now places sole reliance on the 1976 statement and matters that were in the record before the court of appeals. We note that Grolier challenged the verity of this statement when it was before the court of appeals

Footnotes continued on following page

are not chargeable with involvement in all cases that were before the agency during their advisorship." 615 F.2d at 1221.

Second, we note that none of the attachments to the Furth Affidavit would serve as a basis for disqualification because the Ninth Circuit held that one of Congress' concerns in enacting Section 554(d) was to prevent the "possible use in the decisional process of information received outside of the controlled adjudicative setting . . . ." 615 F.2d at 1220. All the documents appended to the Furth Affidavit were introduced as evidence in the controlled adjudicative setting (introduced mainly by Grolier) and therefore there is no danger that Judge von Brand improperly used these documents in arriving at a decision.[11] *See San Francisco Mining Exch.* v. *SEC*, *supra*, 378 F.2d at 169.

Third, it is undisputed that none of the documents Grolier submitted involve the prosecution of this case. The recommendation to issue a complaint was not forwarded to the Commission until after Judge von Brand ceased to serve as an attorney-advisor.[12] Affidavit of Edward Steinman. Very few of the documents Grolier has filed even concern the formal investigation of this case and none of them contain facts or information not adduced at the hearing that could have been interpolated by Judge von Brand.[13] See *Final Report of the Attorney General's Committee on Administrative Procedure*, 56 (1941); *Grolier, Inc.* v. *FTC*, *supra*, 615 F.2d at 1219-20. See also *San Francisco Mining Exch.* v. *SEC*, *supra*, 378 F.2d at 168, 170-71.

Footnotes continued from preceding page

and it should not be allowed to rely upon it now for the first time. See Petitioners' Reply Brief, No. 78-2159 (9th Cir.) at 25-26 n.12. We ordered Grolier to address the issue of timeliness (Order, September 12, 1980 at 3), but it chose not to do so. We, therefore, hold this aspect of the matter is untimely.

[11] In any event, the Supreme Court has made clear that due process is not violated by the mere fact that a decisionmaker has knowledge of investigative facts. *Withrow* v. *Larkin*, *supra*, 421 U.S. at 55.

[12] One document in the record (Johns Aff., Exh. W) is dated after the staff recommended that the complaint issue, but that matter was not before the Commission until after Judge von Brand left his position as attorney-advisor and therefore has no bearing on the issue.

[13] The Commission's investigation leading to this adjudication began on February 22, 1970, with a staff memorandum (Righthand Aff. Exh. AA) requesting the issuance of an investigational resolution and of an Order to File a Special Report. That memorandum recounted public facts about prior

Footnotes continued on following page

Fourth, all the other documents Grolier has referred to concern other matters involving Grolier.[14] Our Order reopening this proceeding directed Grolier to comment on whether any of the documents it submitted fell within the legal definition of "factually related case" as that term is used in the Administrative Procedure Act. 5 U.S.C. §554(d). Grolier chose not to address this issue, apparently relying on the assumption that any time the same party was before the agency a factually related case is involved. The assumption does not withstand analysis.[15] The matters before the Commission while Judge von Brand was an attorney-advisor resulted in a consent order, an assurance of voluntary compliance ("AVC") and compliance reports that followed them. Renewed Motion, 7-13. Under the Commission's present (and former) Rules, both

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Footnotes continued from preceding page
matters involving Grolier, stated that the information on hand was outdated and discussed what information each question in the Special Report was designed to elicit. The Commission authorized both (Johns Aff., Exh. S); (Righthand Aff., Exhs. R and S). No other documents were before the Commission during the formal investigation and therefore could not have been before Judge von Brand. Grolier's Response to the Special Report (Furth Aff., Exh. T), in addition to being presented in the controlled adjudicative setting, clearly went to the staff and not to the Commission (See Johns. Aff., Exh. BB). In April and July 1970, representatives of the Attorney General of Texas and Maryland, respectively, were to examine our files (Johns Aff., Exhs. U and V). On November 7, 1970, staff submitted a progress report to the Commission indicating that it had: received a response to the Special Report; requested and received a supplemental submission; conducted interviews and proposed a questionnaire; and it expected to transmit a proposed complaint in 45 days. There is no allusion to the substance of any of these matters (Righthand Aff. Exh. BB).

[14] Several of the documents submitted by Grolier duplicate each other. Compare Righthand Aff., Exhs. L, M, N and P with Johns Aff., Exhs. J, N, O and P. Several documents are memoranda to the file which were prepared and retained by the Commission's staff and therefore were not available to the Commission (or Judge von Brand). Righthand Aff., Exhs. I and M; Johns Aff., Exhs. D, E, F, B and I. Many of the documents contain no substantive facts or information regarding Grolier but only reflect assignments of a matter (to a Commissioner or to staff) or other procedural matters. Righthand Aff., Exhs. D, F, G, H, K, Q, R, S, T, U, V, X and Z; Johns Aff., Exhs. G, H, K, Q, R, S, T, U, V and W.

[15] The Court of Appeals for the District of Columbia recently stated that "it would be a mistake to assume automatically" that Section 554(d) prevents any *ex parte* communication between the Commission and its staff simply because adjudication arose at one point. *RSR Corp.* v. *FTC*, ___F.2d___ (D.C. Cir. No. 80-2131, April 30, 1981) (slip op. at 10-11). See also *DF* v. *DPA*, 510 F.2d 1292, 1305 (D.C. Cir. 1975); *Alaska S.S. Co.* v. *FMC*, 356 F.2d 56, 61 (9th Cir. 1966).

a consent order and an AVC brought to an end the matter under investigation and required the submission of compliance reports. Neither the consent order (concerning the pre-1964 debt collection practices of Grolier) nor the AVC (concerning the pre-1967 home solicitation and recruiting practices of Grolier) could have formed, or did form, the basis of the complaint in this matter which, by and large, depended on post-1969 evidence. See *Grolier, Inc., supra*, 91 F.T.C. at 437 and n.99. That a respondent may have recidivist tendencies does not make the earlier proceedings "factually related" cases.[16] This interpretation is confirmed by the Attorney General's Manual on the Administrative Procedure Act, 54, n.6 (1947)[17] which discusses how the term is to be construed. It states:

> The limitation of the prohibition against consultation to those who perform investigative or prosecuting functions "in that or a factually related case," should be construed literally.
>
> * * *
>
> The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts. For example, a particular investigation may result in the institution of a cease and desist proceeding against a party as well as a proceeding involving the revocation of his license. The employees of the agency engaged in the investigation or prosecution of such a cease and desist proceeding would be precluded [from assisting in the decision in both proceedings] . . . . However, they would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged as either investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those they had theretofore investigated or prosecuted.

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[16] We note that even in judicial disqualification cases involving criminal matters there is no prohibition against an individual prosecuting another for one offense and subsequently sitting as a judge in a case involving the same offender. *See, e.g., Gravenmier* v. *United States*, 469 F.2d 66, 67 (9th Cir. 1972); *United States* v. *Winston*, 613 F.2d 221 (9th Cir. 1980). Because we conclude that the earlier matters involved here are not factually related, it is not necessary for us to decide whether they are "cases".

[17] The Manual is based on a review of the legislative history of the Administrative Procedure Act. Courts give it deference because of the role of the Department of Justice in drafting the APA. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 524 n.19 (1978).

This interpretation also conforms with the Ninth Circuit's holding that the evils to be avoided by Section 554(d) are both the likelihood that former investigators or prosecutors will interpolate facts not in the record and that because they are likely to have developed a "will to win," they cannot resolve the issues objectively. 615 F.2d at 1120.[18]

Finally we are not convinced, Grolier apparently is, that the mere existence of *ex parte* communications, assuming any took place here with respect to facts at issue in this case, necessarily leads to Judge von Brand's disqualification. Normally under the APA when an *ex parte* communication occurs the remedy is not to disqualify the decisionmaker but to place the communication "on the record" and to give the party not privy to it an opportunity to comment. See *Hercules, Inc.* v. *EPA*, 598 F.2d 91, 123 (D.C. Cir. 1978); *United States Lines, Inc.* v. *FMC*, 584 F.2d 519, 542-43 (D.C. Cir. 1978); *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 58-59 (D.C. Cir.); *cert. denied*, 434 U.S. 829 (1977).

If Judge von Brand had received *ex parte* communications in this case while serving as Judge, under our rules we would not be disqualified, but rather required to place the communications on the record and Grolier would have an opportunity to comment. See 16 C.F.R. § 4.7. Likewise, if the Commission had considered some matter *dehors* the record our decision would not be automatically void for the Ninth Circuit has held that: "to constitute fatal error it must appear that an administrative agency's journey outside the record worked substantial prejudice." *Marathon Oil Co.* v. *EPA*, 564 F.2d 1253, 1265 (9th Cir. 1977). Under these circumstances it would indeed be anomalous to automatically disqualify Judge von Brand simply

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[18] In *San Francisco Mining Exch.* v. *SEC*, *supra*, 378 F.2d at 170-71 n.9, the Ninth Circuit quoted the *R.A. Holman* opinion in rejecting an argument that discovery was mandated by the fact that the decisionmaker had previously prosecuted the same parties. The court held that to disqualify a decisionmaker based on his former status "would be tantamount to disqualifying from participation in a SEC adjudicatory proceeding, all personnel from the Divisions of Corporation Finance and Trading and Exchanges without regard to the extent of their connection with the proceeding in its investigatory states, and would tend to prevent the appointment to the Commissions of persons who have had previous experience with its work." In this case, if Grolier's Renewed Motion were granted it would have a similar effect, but with even less basis.

because he had been exposed to some *ex parte* communication in his earlier status as an attorney-advisor. Here Grolier has all the *ex parte* communications and we specifically directed Grolier to comment on any that indicated he received factual "information . . . outside of the controlled adjudicative setting" that could have been interpolated. Order, September 12, 1980. Despite its voluminous submissions Grolier has not pointed to any specific facts or information that could have been interpolated. We conclude therefore, that even if we were to assume that Judge von Brand saw all the documents the error would be harmless. See 5 U.S.C. § 706.

Conclusion

Our records have been thoroughly searched and Grolier has been given access to all matters that came before the Commission during the time that Judge von Brand served as an attorney-advisor. Grolier has presented no evidence that he was *actually* involved with any Grolier matters. Under the Ninth Circuit's opinion, there is, therefore, no basis on which to disqualify Judge von Brand. 615 F.2d at 1221. Neither has Grolier been hindered in its efforts to secure evidence. The Ninth Circuit urged us to consider giving Grolier documents if Grolier could point to inadequacies or inconsistencies in the affidavits before us. While the Commission did not believe any such defects existed, Grolier was given the documents as a matter of discretion. Even if we were required to assume Judge von Brand was initially familiar with every document (and the Ninth Circuit held that we were not required to do so) disqualification would not follow. None of the documents involve the prosecution of this case or even the decision to issue a complaint. Those few that were created during the time the staff was conducting the formal investigation do not discuss or refer to the substance of the investigation. A large number of the earlier documents do not contain any facts or information that could have been interpolated. Moreover, the bulk of the documents were presented to Judge von Brand in the controlled adjudicative setting and therefore, even if he had seen these items earlier, no improper interpolation could exist. The few remaining documents concern earlier, completed, proceedings against Grolier. Under a proper interpretation of "a factually

related case" as it is used in Section 554(d) of the APA, exposure to those earlier proceedings is not disqualifying. In short, Grolier has not presented a scintilla of evidence to support its argument that Judge von Brand should be disqualified. We therefore deny the motion to disqualify Judge von Brand.

This ruling disposes of all matters we were required to consider by the Ninth Circuit's remand of the case and we might simply reaffirm our earlier Final Order. However since the Final Order issued the Commission has modified the Final Order in another encyclopedia case, *Encyclopaedia Britannica*, Docket No. 8908. We therefore invite the parties to address the issues of whether similar modifications to the Final Order are appropriate in this case and, if so, whether they should be made now, or as in *Britannica*, await appellate review of the Final Order.

Therefore, IT IS ORDERED, that Grolier's renewed motion to disqualify Judge von Brand is denied, and

IT IS FURTHER ORDERED, that Grolier state, within 14 days of this Order, whether it believes a modification of the Final Order is appropriate, the reasons therefor, and when it should be modified, and

IT IS FURTHER ORDERED, that Complaint Counsel thereafter respond to Grolier's submission within 14 days.

By the Commission.

SEAL

/s/ James A. Tobin
Acting Secretary

APPENDIX G

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

GROLIER INCORPORATED, *et al.*, *Petitioners*, v. FEDERAL TRADE COMMISSION, *Respondent*.	April 11, 1983 Nos. 82-7018/7178 ORDER

On Petition for Review of an Order of the Federal Trade Commission

Before: KILKENNY and POOLE, Circuit Judges, and WILLIAMS, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

* The Honorable David W. Williams, Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX H

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: James C. Miller III, *Chairman*
David A. Clanton
Michael Pertschuk
Patricia P. Bailey

In the Matter of ENCYCLOPAEDIA BRITANNICA, INC., a corporation, and BRITANNICA HOME LIBRARY SERVICES, INC., a corporation.	Docket 8908 Issued: October 5, 1982

ORDER MODIFYING CEASE AND DESIST ORDER

The Commission issued its final Order against respondents on March 9, 1976. The Order became effective on March 17, 1980, upon the United States Supreme Court's denial of respondents' petition for certiorari. On March 18, 1980, the Commission issued a stay of Paragraphs II.A, II.B, II.D, and II.E of the Order to allow the Commission to consider a petition from respondents to modify these provisions. On October 28, 1980, the Commission modified these four paragraphs.

On July 2, 1981, respondents filed another petition to reopen and modify the Order together with an application for a stay of the Order pending the Commission's determination of the petition. The Commission denied the stay application on August 5, 1981. On October 9, 1981, respondents filed a supplemental memorandum in support of their request to reopen the proceedings and set aside or modify the Order. Staff and respondents entered into negotiations which resulted in an agreement on proposed modifications to the Order.

In a separate petition to reopen the proceedings filed October 27, 1981, respondents also sought a permanent modification of Paragraph II.D. of the Order. The petition presented persuasive evidence from a consumer survey that presentation of a business card before seeking admission to a customer's home or place of business would communicate the sales purpose of a representative's call as well as the 3" × 5" card now required by the provision.

The Commission has considered respondents' petitions and staff's recommendations and has determined that the public interest requires that parts of the Order should now be modified.

Therefore, IT IS ORDERED, that the following paragraphs be modified as follows:

I.

A. Representing, directly or by implication, either orally or in writing, that:

* * * *

(2) persons will be trained as management trainees, or for other positions of responsibility concerned with administrative office functions unless, in fact, a formal management training program is available to persons accepting employment on the basis of such representations; or misrepresenting, in any manner, the amount and type of training that will be given;

B. Misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the expenses that may be incurred by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person.

C. Failing clearly and conspicuously to disclose all advertising offering employment in any way involving door-to-door sales that respondent is recruiting persons for the sole purpose of soliciting or selling.

D. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at the

initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1) (a) that respondent is recruiting persons for the sole purpose of soliciting or selling;

(b) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(c) the basis for compensating persons so engaged;

(2) that conditions or limitations upon the receipt of compensation, if any, do in fact exist, together with an example of such a material condition or limitation, and that all such conditions and limitations will be stated in detail in an interview in the event an offer of employment is made to such person;

* * * *

(4) that expenses will be incurred by such person in performing required duties, together with an example of such a material expense, and that all such expense items will be stated in detail in an interview in the event an offer of employment is made to such person;

(5) [DELETED]

(6) that such soliciting or selling will be on an "in-home" basis, if such is the fact, or will include soliciting or selling on an "in-home" basis, if such is the fact.

E. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at an interview at which an offer of employment is made and prior to executing any employment agreement with any such person, the following information:

(1) a complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

(2) a complete and detailed description of any expense or expenses any such person may incur in performing the required duties;

(3) (a) the total number of sales employees employed by the office offering the position during the most recent calendar quarter, and (b) the number of sales employees employed by the office who, during the prior calendar quarter, received net earnings equivalent to or greater than the amount represented in the advertisement to which the prospective employee is responding; provided, however, that if the office has been in existence for less than three months or has fewer than five sales employees, respondents shall provide the information described above pertaining to the Division in which the office is located; provided further that such information need not be furnished if the prospective sales employee contacts respondents more than ten days following the dissemination of the most recent advertisement that contains representations of earnings.

Respondent shall afford any prospective sales employee an adequate opportunity to review and consider the above information prior to requesting execution of any employment agreement.

F. Failing to furnish to persons at an interview when an offer of employment is made, and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II, III and VI of this Order, together with a cover letter as set forth in *Appendix A* [not included in this Appendix to Petition For Writ of Certiorari To The United States Court Of Appeal For The Ninth Circuit] attached hereto. Respondent shall afford any prospective sales employee an adequate opportunity to review and consider these provisions of the Order prior to requesting execution of any employment agreement.

II.

A. Representing, directly or by implication, in any advertisement or promotional material that solicits participation in any contest, drawing, or sweepstakes, or solicits any response

to any offer of merchandise, service, or information, and that employs any return card, coupon, or other device to respond to such solicitation, that a person who replies as requested will not be contacted directly by a salesperson for the purpose of selling respondents' products, unless such is the fact. Such advertisements or promotional material shall comply with this Paragraph only if they meet the criteria set forth in Appendix B [not included in this Appendix To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit].

B. Failing, upon the written request of the Associate Director for Enforcement or his designee, to (1) submit any advertisement or promotional material or (2) test any such advertisement or promotional material, using the procedure set forth in Appendix B, to determine whether it complies with Paragraph II.A.

C. Failing to disclose clearly and conspicuously, during any telephone contact and before commencing any sales presentation to prospective customers, the fact that the individual making the call is either soliciting the sale, rental, or lease of publications, merchandise, or services for respondents, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, respondents will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental, or lease of said publications, merchandise, or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a business card of at least 2 inches by 3½ inches containing only the following information is presented to such person:

(1) the name of the corporation;

(2) the name of the salesperson;

(3) the term "sales representative";

(4) an address and telephone number at which the corporation or salesperson may be contacted;

(5) the product or the corporation logo or identifying mark.

F. Representing, directly or by implication, either orally or in writing that:

(1) Any person telephoning or visiting the home of any prospective purchaser is:

(c) telephoning or visiting the home of said prospect for the primary purpose of delivering or disseminating prizes, gifts, gift certificates, chances in any contest, drawing, sweepstakes, educational fund, or any other merchandise or item of chance.

* * * *

(5) any publication, merchandise, or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of respondents' publications, merchandise, or services, pursuant to any agreement to purchase, rent, or lease any other publication, merchandise, service, or combination thereof from respondent, unless respondent complies with all of the terms of the Federal Trade Commission's "Guide Concerning Use of the Word 'Free' and Similar Representations," 16 C.F.R. Part 251, which is hereby incorporated into this Order, and with any modifications or changes that are made to this Guide. All of the provisions of the aforesaid Guide shall be construed as mandatory and binding upon the respondents.

* * * *

I. Representing to any person, directly or by implication, either orally or in writing that:

(1) any price is the retail, regular, usual or words of similar import or effect, price for any publication in any binding, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

(2) any price is the retail, regular, usual, or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

O. [DELETED]

P. [DELETED]

IT IS FURTHER ORDERED that the foregoing modifications shall be effective upon service of this Order upon respondents.

By direction of the Commission, Commissioner Bailey voting in the negative.

SEAL

Carol M. Thomas
Secretary

APPENDIX I

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Lewis A. Engman, *Chairman*
Paul Rand Dixon
M. Elizabeth Hanford
Stephen Nye

In the Matter of the Application of Robert W. Fleishman EXXON CORP. *et al.*, *Docket 8934*	Issued: September 29, 1975

DISSENTING STATEMENT OF COMMISSIONER ENGMAN

By Commissioner Engman:

On July 21, 1975, Robert W. Fleishman, a former Commission employee, formally requested permission under Rule 4.1(b) to appear as an attorney on behalf of respondent Atlantic Richfield in *Exxon, et al.*, Docket 8934, and the Commission has granted the request. I am disappointed that the Commission sees no impropriety in Mr. Fleishman's participation. As in *Application of Basil J. Mezines*, 3 CCH Trade Reg. Rep. ¶ 20,878 (April 10, 1975), I dissent.

Mr. Fleishman worked in the Bureau of Competition from January 7, 1973, until May 26, 1974, and no impropriety arises from this period since he was not connected with or exposed to the case. However, on May 26, 1974, Mr. Fleishman began work as attorney-advisor to Commissioner Hanford, and he remained in Commissioner Hanford's Office until he left the Commission on July 18, 1975. During his tenure as attorney-advisor, Mr. Fleishman's position in relation to the *Exxon* matter was so close that I believe he should be disqualified.

Actual impropriety is not the issue, so far as I know. Mr. Fleishman has represented to us that he in fact had no contact with *Exxon*, and Commissioner Hanford plainly concurs.

Rather the issue is apparent impropriety, and to make that determination I think we must put aside our personal beliefs about Mr. Fleishman's actual inside knowledge and view the case solely from the public's perspective.

As I stressed in *Mezines*, the public has no access to the particular facts of these clearance cases. Unable to read the documents or investigate the employee, the citizen on the outside can look only to the kind of position the employee occupied and the kind of inside information he was likely to be exposed to in that position, when drawing a conclusion about the propriety of clearance. To prevent that conclusion from being a cynical one, I would adopt a stringent standard. I would deny clearance whenever a former employee acquired, or was in a position where typically he would have acquired, nonpublic information which either is in fact sensitive or belongs to a class which typically is sensitive.

Applying this standard requires that Mr. Fleishman's clearance be denied, for the typical attorney-advisor serving in a Commissioner's Office during the months in question would certainly have acquired sensitive or apparently sensitive information about *Exxon*.

An attorney-advisor is a confidential assistant, outside any chain of authority and answerable only to his Commissioner. He occupies a uniquely sensitive position because he typically has access to the whole of his Commissioner's business and his opportunity to witness Commission decision-making is unparalleled. In my judgment, an attorney-advisor performing his typical function can scarcely avoid contact with each major issue coming before the Commission. For that reason, I believe Commissioners' confidential advisors have an ethical responsibility as stringent as that of the Commissioners themselves, and I generally would charge an attorney-advisor with the same inside knowledge chargeable to his Commissioner.

In this case the inside information known to the Commission is substantial, for during Mr. Fleishman's tenure as an advisor the Commmission considered and decided at least thirteen separate *Exxon*-related matters. Some of the matters seem tangential to the substance of *Exxon*, but others went to the core of the case. Among these were Commission decisions

on reconsideration of a motion to dismiss the complaint, a motion for major integrated procedural relief, a motion for preservation of documents, a petition for extraordinary review to require an environmental impact statement, and a motion to disqualify the administrative law judge. Each of these decisions generated some form of recommendatory or deliberative document which is not available to the public; each was discussed by the Commission and, I assume, was privately analyzed in the Commissioners' Offices.

I appreciate my standard is strict, and may disappoint ten worthy lawyers for every scoundrel it deters. But I build from the premise of our basic rule, 16 C.F.R. § 4.1(b)(1), which absolutely bars every former employee from all matters pending during his tenure and makes every clearance an exception. The sweep of this basic rule is sensible if, as I suggest, apparent impropriety is related to the broad issue of government accountability. Each clearance must be justifiable to the public, and in this case I think it unlikely that the public will believe an ex-attorney-advisor never had contact with one of the largest cases in the Commission.

APPENDIX J

October 28, 1977

Nancy L. Buc, Esq.
Weil Gotshal & Manges
767 Fifth Avenue
New York, New York 10022

In re: Application to Appear and Participate in National Talent Associates, Incl., *et al.*, Docket No. 8960

Dear Ms. Buc:

The Commission has decided to deny your application of July 20, 1977 to participate in the above-referenced matter.

The Commission has no reason to doubt your statement that while working at the Commission you had no knowledge of the matter. Still, the Commission's records reflect that you were an attorney-advisor to Commissioner Kirkpatrick on January 10, 1972 when the Commission considered a proposed consent order in this matter. This connection is sufficient in the Commission's view to create under Rule 4.1(b) an appearance of impropriety.

An attorney advisor has an opportunity for in-depth exposure to the full range of confidential information which comes before the Commission. The close relationship which typically exists among a Commisioner and his or her staff, together with an attorney-advisor's customary attendance at Commission meetings, warrants the not unreasonable public perception that the advisor either has some involvement in or knowledge of all matters reviewed in the Commissioner's office. Where, as here, the Commission's initial consideration went to the substance of the case,[1] we believe that subsequent particip-tion by a former attorney-advisor on the other side conflict with the letter and spirit of the Commission's Rules.[2]

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[1] Commission records show that a proposed consent order in this matter was placed upon the Commission's agenda on January 4, 1972, and was rejected by the Commission at its meeting of January 10, 1972. Subsequent negotiations failed to achieve a satisfactory agreement and the Commission issued a complaint on April 3, 1974. The matter was then withdrawn from adjudication and a final consent order was accepted on November 26, 1975.

[2] Unlike a rulemaking, which creates a legislative-type standard, the formulation of an order against a particular respondent is practically certain to raise factual and legal issues almost identical to those that will be raised by any subsequent compliance proceeding.

The decision which the Commission reaches in this matter is not without precedent. The Commission adopted a similar view in the context of your application to participate in all shopping center matters including Tysons Corner Regional Shopping Center, *et al.*, Docket 8886, R. H. Macy & Co., Inc., File No. 721 0073, and J. C. Penney, Inc., File No. 721 0075. By letter of September 26, 1973, the Commission denied your application on the grounds of actual or apparent impropriety.[3] The Commission took this action despite your affidavit that you neither participated in nor had any connection with or knowledge of any of the shopping center matters while you were a Commission employee. While there exists intervening precedent of the contrary,[4] the Commission by its action here expressly overrules those decisions.

By direction of the Commission. Commissioners Dole and Dixon dissenting. Commissioner Dixon's statement is attached.

(Mr.) Carol M. Thomas
Secretary

Enclosure

Dissenting Statement of Commissioner Dixon

I cannot agree that Ms. Buc should be disqualified from appearing in this case. She seeks to participate as counsel to a respondent under investigation for possible violations of a consent order. The consent order was signed, and compliance proceedings begun, several years after Ms. Buc left the Commission. During Ms. Buc's tenure at the Commission, however, a different consent order was presented to the Commission for consideration. The Commission rejected the order and placed the case in adjudication. This occurred more than five years ago. The case was eventually withdrawn from adjudication for entry of the consent order, compliance with which is now being measured.

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[3] The Commission's letter unfortunately did not elaborate upon the reasons for denial. Commission records, however, show that you were an attorney-advisor to the Chairman while the Tysons Corner matter was before the Commission.

[4] Commission letter of September 29, 1975 to Robert W. Fleishman, Esq., regarding Exxon et al., Docket No. 8934; Commission letter of August 31, 1976, to Donald A. Lofty, Esq., regarding Proposed TRR Concerning Used Motor Vehicles; Commission letter of October 15, 1976, to Donald A. Lofty, Esq., regarding Brunswick Corp., et al., Docket No. 9028.

In her application for clearance, Ms. Buc states that she did not participate in or have any knowledge or connection with even the remotely related phase of this case that was pending during her tenure here. She further states that the files of this matter never came to her attention. The Commission has discovered absolutely no evidence to contradict these assertions, and acknowledges that it has no reason to doubt them. However, because Ms. Buc served as an attorney-advisor to the Chairman while that early phase of this case being considered by the Commission it is argued that it might possibly appear to some members of the public that Ms. Buc saw the file or heard relevant conversations, and thereby obtained an advantage in representing her client in the current proceeding. The Commission does not explain precisely what advantage Ms. Buc might be thought to have obtained, and an inspection of the documents she might appear to have seen makes clear that no possible advantage could derive even to someone who had made and retained a copy of them for future use, let alone someone who might appear to have taken a casual peek more than five years ago. It is similarly hard to discern how a meeting held to discuss currently irrelevant documents could have produced anything currently of value, but I cannot say this for certain since no one at the Commission can recall what went on at this meeting which Ms. Buc (her denials aside) "might be thought" by the public to have attended and to remember five years and nine months later. (The formal minute of the meeting certainly reveals nothing of current value.)

The principle underlying this decision then appears to be that if an attorney "might appear" to have at one time seen documents or heard conversations related to "the substance of a case" the attorney is forever disqualified from participating in the "case", no matter how much time has elapsed, no matter that the documents which "might have" been glimpsed would afford no advantage even if remembered, and no matter how remotely related is that phase of the "case" in which participation is sought to that phase of the "case" to which the applicant's earlier access is deemed to warrant disqualification.

Needless to say, this approach is inconsistent with the one taken by the Commission in judging recent clearance requests. That, of course, is the Commission's prerogative. In exercising

it, however, I believe that the Commission has neglected to analyze properly just what it is that creates real and legitimate suspicions on the public's part, and how such suspicions might be dispelled. The result is a rule which at no small cost cures a good many more imagined evils than real ones.

To illustrate the line of reasoning that must underlie the Commission's decision let us suppose that Ms. Buc had been granted clearance in the instant case. The Commission knows, of course, that Ms. Buc would have had no actual advantage in representing her client. She never participated in any phase of this case while at the Commission; we have no reason to believe she ever saw the files of the case or heard it discussed, and we know that even had she seen the memorandum which passed through Chairman Kirkpatrick's office while she was one of his four advisers, and even if she remembered the memo, it would give her no advantage. So there are no secrets being withheld here, and any member of the public who shared the Commission's acquaintance with all the facts would realize there was no impropriety. But the Commission is concerned that a member of the public not privy to all the facts would look upon the situation and believe Ms. Buc's participation to be improper. We should then ask ourselves, what would a member of the public have to know (and not know) in order to hold the *erroneous* impression that Ms. Buc would have an unfair advantage in representing her client? First he would have to know that more than five years ago Ms. Buc served as attorney adviser to Chairman Kirkpatrick. Then he would have to know that during that period, more than five years ago, during which she served as attorney adviser, a memo circulated through the Chairman's office relating to National Talent Associates. I suspect these qualifications would effectively reduce the pool of potential cynics to a handful, if that, but those who remained would in addition have to be ignorant of the memo's actual contents, or the subsequent history of the case, since they would otherwise realize that even if Ms. Buc, contrary to her oath, had seen the memo or heard [illegible]sation relating to it, this could have given her no advantage in the current undertaking.

It thus seems to me that in professing to vindicate the suspicions of a skeptical public, the Commission has, without evidence, invoked a number of dubious, and highly arbitrary

assumptions regarding what that public actually believes. On the one hand the public is assumed to know where Ms. Buc worked and what passed through the suite of offices in which she worked, five years ago. The public is assumed to believe that Ms. Buc lies or forgets when she states that she never worked on the matter or saw the memo, but the public is further assumed to believe that Ms. Buc's memory is so good that, having seen the memo or heard conversation relating to it five years so, she continues to recall their contents. On the other hand, the public is assumed *not* to know that the case has evolved substantially since the time of the original memo, that the instant phase of the proceedings bears little relationship to the memo Ms. Buc is suspected to have seen, and that even had she seen and remembered the memo, it would give her no advantage.

The approach taken by the Commission in this case appears to derive from the dissenting statement of former Chairman Engman in a case involving a request for clearance by an attorney-adviser to participate in the *Exxon* litigation, Docket No. 8934. Even if one agrees with the former Chairman's position in that matter the differences between that case and this one are substantial. There, an attorney-adviser sought clearance immediately upon leaving the Commission to participate in the ongoing Part III case against eight oil companies. The attorney denied any involvement with the case while at the Commission, but it was undisputed that the Commission during his tenure had voted on numerous interlocutory motions raised by parties to the case, in adjudicative session to which the applicant was, while neither complaint counsel nor respondents' counsel were, allowed access. If the Commission is concerned, as it should be, with what may *realistically* appear to the public to be improper, I find an enormous difference between that case and this.

I gather there is some sentiment for a rule of such expansiveness because it is thought to be easy to apply and in some sense "fair". Of course, this rule is not easy for a member of the private bar to apply; five years after leaving the Commission most attorneys would not have the slightest notion that anything pertaining to their intended client had circulated through their former boss's office during their tenure at the

Commission. Thus, this Rule would not spare most attorneys the trouble of applying for clearance, nor would it spare the Commission the need to conduct an investigation. The Rule is "fair" only in that it would save us the necessity to make distinctions between the circumstances of an attorney who leaves on Friday and seeks to participate in an ongoing case the following Monday, and the case of Ms. Buc who left in 1972 and sought to participate in 1977. I find this a peculiar sort of fairness.

Our rules of practice, and federal criminal statutes, wisely distinguish the situation of "personal and substantial" participation from the situation here. Where personal and substantial participation in a matter has occurred, disqualification is proper. Even if the applicant has obtained no actual advantage, the fact of his or her earlier participation in the same matter for the government is likely to arouse legitimate suspicion on the public's part that the applicant's knowledge and recall of the matter is substantial and unmeasurable. Where, however, disqualification is predicated simply on grounds of possible "access" to documents pertaining to a case, I think it behooves the Commission to take into account such factors as the sensitivity or usefulness of the documents, in light of the posture of the case at the time clearance is sought, as well as the ostensible likelihood that the documents were actually seen and remembered. If the documents are indeed sensitive, and knowledge of them could indeed confer an advantage, then the Commission should disqualify if it might appear to a reasonable person that the applicant could have seen and recalled them. If, however, the nature of the documents is such, in light of the circumstances at the time of clearance, that they would confer no advantage even assuming the applicant had seen and remembered them (which, as noted, becomes an increasingly dubious assumption as the length of time since the applicant left the Commission increases), then the applicant should be cleared. I doubt in such cases that the appearance of impropriety will occur to any substantial or insubstantial segment of the public, but to dispel any uncertainty in close cases the Commission could simply state in granting clearance that while the applicant was found to have had possible access to documents pertaining to the case, inspection revealed them to be of no usefulness. The public may believe that the government is

full of knaves, but I hope it is not also thought to be full of idiots who cannot read a memo and figure whether it contains anything that could possibly give someone with knowledge of it an unfair advantage. After all, it is in the *self interest* of government attorneys to prevent participation by those who might have an unfair advantage. Government attorneys like those anywhere else are desirous of winning their case and being successful. Surely the public can be asked to believe that their servants are guided by these, if not saintlier, impulses.

Admittedly, in attempting to make the judgments my approach entails the Commission will come across hard cases, and the resulting decisions may not achieve perfect "consistency". But unquestionably such an approach will detect all those instances in which there is a genuine threat to the public interest, while allowing participation in many cases in which there is none. Former Chairman Engman acknowledged that the rule he advocated might disappoint ten worthy applicants for every scoundrel it deterred. I would rather try to disappoint just a couple of worthy applicants for every scoundrel I deter. I do not think that is unfair to the couple of worthy applicants who are disappointed, and it does much better by the ones who are not.

Finally, I must remark on the less obvious costs of the rule applied by the majority. I am sure that Ms. Buc will prosper with or without her fee in this case but in the long run I think the kind of blunderbuss approach taken here can only deter qualified applicants from working at this agency for fear that if they subsequently decide not to make it their permanent career they will find themselves severely hampered in trying to use their accumulated expertise in the outside world. It is not sufficient for us to proclaim, like modern day Marie Antoinette's "Let them go teach." For those who enter the agency at high levels with contacts and credentials transcending their experience here, it may indeed be feasible to anticipate a future career unrelated to the mundane practice of FTC law. For many staff members who enter directly from law school, however, and whose contributions are no less vital to the work of this agency, a future career doing antitrust law or trade regulation law may be the most realistic alternative in the event that they cannot satisfy their legitimate aspirations at the FTC.

Moreover, while the "revolving door" is not maligned without reason, there is much that is entirely proper and in the public interest in having employees of this agency leave to take jobs representing firms which must comply with our laws.

Forty years in government leave me unable to underestimate the ability of the private bar to make life disagreeable for representatives of the Federal Trade Commission. But I am also aware that compliance by industry with the laws we attempt to enforce depends heavily upon the existence of an ethical and *knowledgeable* private bar capable of advising its clientele on how to steer clear of our wrath. I find it wholly appropriate in this regard, manifestly in the public interest, and not at all a matter for contempt or discouragement that at least some attorneys should first serve in the Federal Trade Commission and subsequently utilize the expertise they have gained to represent and advise companies in the private sector. Obviously abuses of inside information must be curbed, but in attempting to do so we must recognize that serious competing values exist. The public is understandably suspicious of the integrity of some government proceedings, but for us to react by catering to every imaginable, hypothetical suspicion, no matter how arbitrary or capricious does not serve the purpose of ensuring public trust and disserves other purposes in which the public also has an important stake.

I believe that this decision is an unwarranted overreaction to a legitimate concern and I therefore cannot join in it.

APPENDIX K

August 16, 1978

Robert L. Wald, Esquire
Wald, Harkrader & Ross
1320 19th Street, N.W.
Washington, D.C. 20036

Re: Application to Appear and Participate in Dockets C-2582 and C-2595

Dear Mr. Wald:

This responds to your letter of March 27, 1978, in which you renewed your request that Messrs. Robert A. Skitol and Mark Schattner be granted clearance to participate in matters relating to and arising under the Commission's consent orders against Ford Motor Co. in Docket C-2582 and J. Walter Thompson Company in Docket C-2595. The Commission has determined to grant the request.

The Commission has carefully considered whether such participation by Messrs. Skitol and Schattner would involve "any actual or apparent impropriety," 16 C.F.R. §4.1(b)(3).* Mr. Skitol states that although he recalls having seen and briefly discussed with a colleague papers relating to some of the advertising that later became the subject of the proceedings in Dockets C-2582 and C-2595 while he served as Assistant to the Director of the Bureau of Consumer Protection he has no present recollection of the contents of any such papers. Mr. Schattner states that he has no recollection of having seen or discussed any such papers.

The Commission finds that, even though the papers in question came to Mr. Skitol's attention, their nature is such that no present advantage could be conferred by such access. The Commission further finds that, even if it be assumed that documents relating to these matters would have come to Mr.

* The other grounds in 16 C.F.R. §4.1(b)(3) for a denial of a request for clearance to participate are clearly inapplicable.

Shattner's attention in the course of his duties as Attorney-Advisor to Commissioner Mary Gardiner Jones,** their nature is such that no present advantage could be conferred by such access.

Accordingly, the Commission has determined that no "actual or apparent impropriety" would attend the participation of Messrs. Skitol and Schattner. To the extent that the decision in the matter of the clearance application of Nancy L. Buc in *National Talent Associates*, Docket 8960 (October 28, 1977), may be read as leading to a different result, the Commission declines to follow that decision.

Commissioner Clanton would deny clearance to both Mr. Skitol and Mr. Schattner in the belief that participation of either individual in matters relating to the Commission's consent orders against the Ford Motor Co. in Docket C-2582 and J. Walter Thompson Co. in Docket C-2595 would involve an appearance of impropriety. Although Mr. Schattner was not a Commission employee at the time these consent orders were considered by the Commission, his role as an attorney-advisor to Commissioner Jones on January 22, 1973, when the Commission voted to issue proposed complaints in these cases brings him within the holding of the recent Commission decision involving Nancy L. Buc.*** As the Commission noted in denying that clearance application:

> An attorney-advisor has an opportunity for in-depth exposure to the full range of confidential information which comes before the Commission. The close relationship which typically exists among a Commissioner and his or her staff, together with an attorney-advisor's customer attendance at Commission meetings, warrants the not unreasonable public perception that the advisor either has some involvement in or knowledge of all matters reviewed in the Commissioner's office.

** Based on Mr. Schattner's recollection and staff's investigation, we conclude that it is unlikely that such documents would in fact have come to his attention.

*** Commission letter of October 28, 1977 denying clearance to Nancy L. Buc regarding *National Talent Associates, Inc., et al.*, Docket No. 8960. (Commissioners Dixon and Dole dissenting.)

Thus, despite Mr. Schattner's statement that he has no recollection of participating in, or knowing about, this matter as a Commission employee, his subsequent participation on the other side would give rise to an appearance of impropriety.

Mr. Skitol was an assistant to the director of the Bureau of Consumer Protection at the time a formal investigation of these matters was opened on October 26, 1971 and has stated in his affidavit that he recalls having seen papers relating to these matters and having discussed them with the Assistant Director for National Advertising. This admission is sufficient in Commissioner Clanton's view to warrant a denial of Mr. Skitol's request based on an appearance of impropriety.

By direction of the Commission. Commissioner Clanton dissenting.

SIGNED AND MAILED

JAMES A. TOBIN
Acting Secretary

APPENDIX L

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

November 16, 1978

S. Mark Tuller, Esquire
Arnold & Porter
1229 Nineteenth Street, N.W.
Washington, D.C. 20037

Re: Request for Clearance to Participate in *The Kroger Company*, Docket No. 9102

Dear Mr. Tuller:

This responds to your letter of October 19, 1978, requesting clearance to participate in *The Kroger Company*, Docket No. 9102. The Commission has determined to deny your request.

The Commission has determined that your application complies with § 4.1(b)(2) of the Commission's Rules of Practice and that the restrictions of §§ 4.1(b)(3)(i) and (ii) are not applicable. The information stated in your application and the results of an informal inquiry conducted by staff disclose, however, that certain retail food advertising matters, including comparative price claims, considered by the Commission during the time in which you served as attorney-advisor to the Chairman Engman have, as demonstrated by documents on the public record,* been raised as issues in the matter for which you request clearance. The Commission finds that nonpublic information concerning these matters, which information would confer a present advantage in Docket No. 9102, was likely to have come to your attention during the course of your duties as

* *E.g.*, *Application for Review of the Administrative Law Judge's Orders of October 18 and November 15, 1977*, dated January 6, 1978; and *Answer to Respondent's Application for Review of the Administrative Law Judge's Orders of October 18 and November 15, 1977*, dated February 2, 1978.

attorney-advisor** and concludes that your participation in *The Kroger Company*, Docket No. 9102, would involve an actual or apparent impropriety within the meaning of Section 4.1(b)(3) of the Commission's Rules of Practice.

It is against Commssion policy to informally advise persons requesting clearance to participate in Commission proceedings of determinations to deny clearance. Such action would be detrimental to the Commission's attempts to provide guidance to other former employees seeking to participate in Commission proceedings. The Commission has directed that a copy of this correspondence be placed on the public record in this matter.

By direction of the Commission. Commissioner Pitofsky did not participate.

Carol M. Thomas
Secretary

** See Commission letter of October 28, 1977 to Nancy L. Buc regarding request to participate in *National Talent Associations, Inc.*, Docket No. 8960 (Commissioners Dixon and Dale dissenting).

No. 83-50

In the Supreme Court of the United States

OCTOBER TERM, 1983

GROLIER, INCORPORATED, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the pattern of deliberate and repeated deceptive practices found by the Federal Trade Commission on this record warranted the Commission's conclusion that requiring petitioners to make certain disclosures in their advertisements and at-home solicitations is necessary to remedy those practices and prevent their recurrence.

2. Whether the Commission's Administrative Law Judge should have been disqualified because he had previously served as an attorney-advisor to a Commissioner, even though he had never been exposed to any factual information about the case in his prior position, or participated in any way in its investigation or prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 699 F.2d 983.[1] The Final Order of the Federal Trade Commission (Pet. App. B1-B22) is reported at 99 F.T.C. 379. The Commission's Order Modifying Cease and Desist Order (Pet. App. D1-D6) is reported at 98 F.T.C. 882. The Commission's Order Denying Motion to Disqualify Judge von Brand (Pet. App. F1-F15) is reported at 98 F.T.C. 115.[2] The opinion of the Federal Trade Commission (Pet. App. E1-E15) is reported at 91 F.T.C. 476. The initial

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[1]An earlier opinion of the court of appeals (Pet. App. C1-C12) is reported at 615 F.2d 1215.

[2]The Commission's initial order on Judge von Brand's disqualification is reported at 87 F.T.C. 179 (1976).

decision of the Administrative Law Judge is reported at 91 F.T.C. 315.[3]

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983 and amended on March 2, 1983. A petition for rehearing was denied on April 11, 1983 (Pet. App. G1). The petition for a writ of certiorari was filed on July 9, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the First and Fifth Amendments to the Constitution, Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45, and the Administrative Procedure Act, 5 U.S.C. 554(d), are set forth at Pet. 2-3.

STATEMENT

1. Petitioners Grolier, Inc. and its wholly-owned subsidiaries ("Grolier") publish and distribute encyclopedias, other reference works and services, training courses, and teaching machines. Their products, which have included *Encyclopedia Americana*, *Encyclopedia International*, *New Book of Knowledge*, *World's Greatest Classics*, *Book of Popular Science*, and *Children's Hour*, are sold door-to-door and by mail solicitations (Pet. App. E1-E2).

To gain entry into a potential customer's home and to overcome resistance to door-to-door sales solicitations, petitioners trained and directed their salespersons not to mention encyclopedias at the door, to avoid using the word "sale" during the presentation, and affirmatively to misrepresent the actual purpose of their visits. For example,

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[3]Petitioners have not reproduced the initial decision, although its detailed findings and conclusions were, with a few exceptions, adopted by the Commission. Cf. Rule 21(k)(ii) of this Court's Rules.

petitioners instructed their salespeople to characterize the visit as an interview, survey, or club enrollment and, if questioned, to deny any intent to solicit sales. Petitioners' sales representatives falsely stated that the visit, whether characterized as a survey, interview, or awarding of prize certificates, would take only a few minutes of the consumer's time, thus reinforcing the misrepresentations about the purpose of the visit (91 F.T.C. at 370-381).

Petitioners also used various alleged contests and other misleading promotions to obtain leads for potential sales. For example, through advertisements in nationally circulated magazines, they offered to send free booklets to consumers. But none of these advertisements disclosed that those responding would be contacted by salespersons. After the booklets were mailed, sales representatives contacted the recipients to set up appointments for standardized sales presentations. Another device involved false "drawings" for free vacations. All entrants who qualified as prospective customers were informed by telephone that they had won a free vacation, but that their vacation certificate would be awarded at a personal appointment. No drawing had been held, however; the real purpose for soliciting entrants was to identify prospective purchasers (91 F.T.C. at 368-370).

In still another approach, petitioners contacted parochial schools by claiming affiliation with educational groups or associations. On the pretext of taking a poll or developing interest in federal support for use of petitioners' educational programs by the schools, they obtained lists of parents' names. Petitioners then distributed materials, including response cards, to the parents, but mailed in such a manner that the packet appeared to have originated with the school or diocese. Sales staff thereafter contacted parents who returned the cards to arrange "free demonstrations" which in fact were sales presentations (91 F.T.C. at 363-368). In

addition, petitioners employed numerous other deceptive sales practices, including deceptive offers of merchandise at reduced prices in exchange for "cooperation" (*id.* at 377), misleading retail list prices to aid "discount sales" (*id.* at 381), and misrepresentation of financial terms and endorsements (*id.* at 376-406).

Petitioners also used deceptive practices to recruit sales people. They often placed "blind" advertisements that did not disclose the nature of the position, the company name, or the product involved. These ads frequently contained misleading salary or income guarantees. In other instances, petitioners' ads falsely claimed that the positions did not involve sales, and misrepresented sales jobs as involving public relations, interviewing and opinion polling, advertising work, managerial training and the like. When interested persons contacted Grolier, petitioners scheduled personal interviews, but no additional information was disclosed over the telephone regarding the true nature of the employment. The deception often continued into the interview and hiring process, misleading many applicants through the initial interview (91 F.T.C. at 350-361).

Petitioners' debt collection and mail order procedures also involved deliberate false, misleading and deceptive practices (91 F.T.C. at 407-424).

2. On March 9, 1972, the Federal Trade Commission ("FTC") issued an administrative complaint alleging that Grolier's sales and recruiting practices were unlawful under Section 5 of the Federal Trade Commission Act, 15 U.S.C. (& Supp. V) 45. The Administrative Law Judge ("ALJ") initially assigned to the case presided through the pretrial stages and continued with the evidentiary hearings until his retirement early in 1975. He was succeeded by ALJ Theodor P. von Brand, who held his first prehearing conference on March 19, 1975. At Grolier's insistence, he ultimately

reheard much of the testimony. Almost a year later, and just five days before the end of the hearings, Grolier's president testified that in 1966 or 1967 he had attended a meeting at which Commissioner MacIntyre was present. Judge von Brand immediately stated that he had been an attorney-adviser to Commissioner MacIntyre from 1963 until January 1971, but had no recollection of any matters involving Grolier (Pet. App. F3).

Judge von Brand denied Grolier's subsequent request that he disqualify himself. Grolier claimed that his participation as an administrative law judge violated the separation of functions provisions in the Administrative Procedure Act, 5 U.S.C. 554(d). That statute bars employees who perform investigative or prosecuting functions in any case from participating or advising in the agency's decision. Grolier also claimed that von Brand's participation created the appearance of impropriety, and demanded document discovery. Judge von Brand stated on the record that his past service as an attorney-adviser had been publicly disclosed when he became an ALJ in March 1975, that he had no recollection of ever working on Grolier matters, and that a search of Commissioner MacIntyre's files and of his own files had disclosed nothing related to Grolier. *Grolier Inc.*, 87 F.T.C. 179 (1976).

The Commission declined to disqualify the ALJ, holding that legal advisers to Commissioners are essentially like law clerks, and act in an advisory rather than in an investigative or prosecutorial role. Discovery, it held, was therefore unwarranted as a matter of law (*ibid.*).

Grolier then incorporated its discovery demands into a request under the Freedom of Information Act, 5 U.S.C. 552. It received most of the documents requested on June

28, 1976. Ultimately, all of the Commission documents Grolier sought were disclosed (Pet. App. F4-F5).[4]

3. Meanwhile, on October 12, 1976, ALJ von Brand issued his initial decision finding extensive and deliberate violations of Section 5 of the Federal Trade Commission Act (91 F.T.C. at 331). On Grolier's appeal, the Commission adopted substantially all of the ALJ's findings on liability, modified his proposed order, and reconfirmed its earlier rejection of Grolier's disqualification arguments (Pet. App. E1-E15).

The Commission found that petitioners' solicitation methods affirmatively misrepresented the real purpose of in-home visits, which was to sell the company's products. It therefore required that when seeking admission to a home or business to solicit sales, petitioners' representatives present a card setting forth in large type the name of the sales person, the name of the corporation, the term "Encyclopedia Sales Representative," and disclosing that "the purpose of this representative's call is to solicit the sale of encyclopedias (Pet. App. E5; A7).

To remedy petitioners' deceptive lead-gathering techniques, the Commissioner required Grolier to inform consumers that their responses to contests and promotions may result in a visit by a sales representative. The Commission subsequently permitted any of three similar formats for this

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[4]Grolier sued under the Freedom of Information Act for disclosure of the remaining documents. *Grolier, Inc.* v. *FTC*, 1978-1 Trade Cas. (CCH) para. 62,084 at 74719 (Mar. 10, 1978). After ordering a further search that produced nothing, the district court ruled that the withheld documents were exempt from mandatory disclosure. Grolier's appeal from this decision was dismissed after the Commission, on March 10, 1981, released the 28 documents still in contention (Pet. App. F4-F6). Petitioners thus obtained, *inter alia*, every document relating to Grolier that circulated among the Commissioners while von Brand served as an attorney-adviser (*id.* at F7).

disclosure, and provided that, with Commission approval, petitioners could use any other disclosure that clearly and conspicuously indicates that responding consumers may be contacted by sales people (*id.* at B4-B5, D1-D4).[5]

Finally, to remedy petitioners' deceptive recruitment practices, the Commission required them to disclose in advertising that [they are] recruiting encyclopedia salesmen (Pet. App. E4).

4. On Grolier's first petition for review (*Grolier I*), the court of appeals (Pet. App. C1-C12) found it unnecessary to reach any issue except the Commission's refusal to allow discovery concerning the ALJ's possible role in the case as an attorney-adviser. The court rejected the FTC's view that a Commissioner's legal assistant has no investigative or prosecutive role. It held that under 5 U.S.C. 554(d), such an assistant must be deemed to have performed an investigative or prosecuting function if, in his capacity as an adviser to a Commissioner, he became acquainted with *ex parte* information. It excepted from this holding actively serving attorney-advisers, "who must counsel the member at both the investigative and decision-making stages of a case" (Pet. App. C8). While this exception would not apply to ALJ von Brand, who is no longer an attorney-adviser, the court nevertheless rejected Grolier's claim that the ALJ was disqualified *per se* by virtue of his former position. In the court's view, the issue under 5 U.S.C. 554(d), is one of fact: whether, while an attorney-adviser, von Brand had actually been apprised of *ex parte* information about Grolier (Pet. App. C9-C10). Because the Commission had flatly denied discovery on a ground the court viewed as legally

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[5]The subsequent changes in the original order were intended to conform it with the modified order in *In re Encyclopaedia Britannica*, 96 F.T.C. 778 (1980). See Pet. App. D1.

erroneous, it remanded for reconsideration of the disqualification (*id.* at C11). The Commission was not automatically required to grant discovery, but only to "produce sufficient information to permit it and a reviewing court to make an accurate 554(d) determination" (*ibid.*).

5. On remand, ALJ von Brand submitted an affidavit confirming his prior statements that he could not recall ever having worked on Grolier matters as an attorney-adviser; that conversations with Commissioner MacIntyre and his secretary showed that another attorney-adviser had done so; and that searches of his own records, Commissioner MacIntyre's records and the Commission's records had disclosed nothing connecting him with the Grolier case (Pet. App. F5).

Commissioner MacIntyre also filed an affidavit explaining that under his compartmentalized assignment procedure, von Brand worked only on cases in an adjudicatory status, and did not work on investigative matters; that he could not recall ever discussing Grolier with von Brand; and that he was unaware of any contact by von Brand with Grolier matters while an attorney-adviser (*id.* at F5-F6).

In addition, the Commission noted that Grolier had in fact obtained extensive disclosure, including every pre-complaint document circulated among the Commissioners (see page 6 note 4, *supra.*) Not one document connected von Brand with the Grolier matter during his employment as an adviser (Pet. App. F6-F7).

6. On Grolier's second petition for review (*Grolier II*) the court of appeals affirmed and enforced the Commission's order (Pet. App. A1-A9). It found that the evidence before the Commission on the disqualification issue, and the extensive document disclosure made by the Commission (*id.* at A3, n.3) "adequately show that the ALJ was not involved in the Grolier investigation" (Pet. App. A4). It

concluded that Grolier's further demands for discovery were "a pure fishing expedition" seeking "to return this marathon proceeding to square one to further delay imposition of the FTC's cease and desist order" (*id.* at A4).[6]

Grolier did not challenge the Commission's findings on liability. It contended instead that the remedial provisions in the Commission's order violated the First Amendment's protections for commercial speech because they were broader than necessary. The court of appeals disagreed, holding that the First Amendment does not protect unlawful or misleading speech and that the Commission's order was properly and reasonably related to the illegal trade practices it sought to remedy (*id.* at A5-A8).

Judge Poole dissented from the Court's holding on the disqualification issue. He would have allowed Grolier to depose Judge von Brand (*id.* at A9).

ARGUMENT

Petitioners' challenges to the remedies in the Commission's order, and to the Commission's refusal to disqualify the ALJ, were fully considered and correctly resolved by the Commission and the court of appeals. These rulings are consistent with the decisions of this Court and of other courts of appeals. Accordingly, further review is not warranted.

1. Petitioners concede that, consistent with the First Amendment, the Commission may prohibit misleading commercial speech and remedy it by requiring affirmative disclosures "reasonably necessary" to prevent deception

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[6]The Commission's remedial order, originally entered March 13, 1978, and modified August 13, 1981, will not become operative until all review is completed. 15 U.S.C. 45(g).

(Pet. 10, 12).[7] They ask only that this Court review their claim that the specific remedies the Commission adopted in this case violate the First Amendment because the disclosures required are broader than "reasonably necessary." Determining what is "reasonably necessary" to correct misleading and deceptive speech, however, requires purely factual inquiries into the deceptive practices, the propensities of the malefactor, and the extent to which particular remedies will work. The latter question implicates as well the expert remedial knowledge and experience of the agency.[8]

Thus, when seeking to remedy misleading advertising the Commission may constitutionally "require that a commercial message appear in such a form * * * as [is] necessary to prevent its being deceptive." *Friedman* v. *Rogers*, 440 U.S. 1, 10, 16 (1979), quoting *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976). See, *e.g.*, *Bates* v. *State Bar*, 433 U.S. 350, 383-384 (1977). Use of affirmative disclosure requirements to assure truthful advertising of the kind involved in this case is a recognized and, indeed, a preferred remedial technique. See *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates* v. *State Bar, supra*, 433 U.S. at 375. So long as the remedy is "reasonably necessary to prevent the deception," such requirements do not contravene the First Amendment. *In re R.M.J., supra*, 455 U.S. at 203. See *Friedman* v. *Rogers, supra*, 440 U.S. at 10, 16.

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[7] *Bolger* v. *Youngs Drug Products Corp.*, No. 81-1590 (June 24, 1983), slip op. 4-5; *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 561-563 (1980); *Friedman* v. *Rogers*, 440 U.S. 1, 9-11 & n.9 (1979); *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 455-456 (1978).

[8] *FTC* v. *Standard Education Society*, 302 U.S. 112, 120 (1937); *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392-393 (1959); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).

The Commission and the court of appeals correctly resolved the complex factual and remedial issues presented by the "reasonably necessary" test. Significantly, the remedies initially imposed in this case are identical to those initially imposed in *In re Encyclopaedia Britannica, Inc.*, 87 F.T.C. 421 (1976), aff'd, 605 F.2d 964 (7th Cir. 1979) cert. denied, 445 U.S. 934, modified, 96 F.T.C. 778 (1980), 100 F.T.C. 500 (1982).[9] That case involved essentially similar misconduct. The court in *Britannica* noted (605 F.2d at 973) the Commission's finding that the remedies were "required to prevent future deception" and rejected the company's argument that such a remedy was not "the least restrictive alternative which will adequately further the legitimate governmental interest in the prevention of deception."

The Commission's findings, no longer contested, reflect this approach. It determined that petitioners' deceptive sales practices were pervasive, deliberate, and continuing. Most of these deceptive practices occurred during in-home solicitations, which may be more strictly regulated than other forms of speech under the First Amendment because consumers are especially vulnerable in such confrontations. See *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 449, 457-458 (1978). Furthermore, petitioners were well aware that the kinds of deceptions at issue here, a persistent

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[9]The Commission subsequently modified the remedies in this case (Pet. App. D1-D6) to conform to certain modifications it granted after the denial of certiorari in *Encyclopedia Britannica, supra*, but it declined to allow Grolier certain other specific modifications that had been granted to Encyclopedia Britannica because of that company's compliance experience. See page 7 note 5, *supra*. As the FTC noted (Pet. App. D2), Grolier lacks similar compliance experience.

problem in the door-to-door retailing of encyclopedias,[10] have long been condemned: Grolier units have repeatedly been censured for such misconduct.[11]

To prevent recurrence of these deceptions, the Commission required petitioners to: (1) apprise potential customers of the true purpose and identity of petitioners' salespersons; (2) disclose in their lead-gathering materials that persons who respond may be contacted by petitioners' salespersons; and (3) reveal in their recruitment advertising and at the interview the nature of the job offered and the

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[10]See, *e.g.*, *FTC* v. *Standard Education Society, supra*, 302 U.S. at 113-118; *Encyclopaedia Britannica, Inc.* v. *FTC*, 605 F.2d 964, 966-970 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980); *In re Crowell-Collier Publishing Co.*, 70 F.T.C. 977, 1010-1013, 1021-1026 (1966); *In re Encyclopaedia Britannica, Inc.*, 59 F.T.C. 24, 34-38 (1961); *In re Basic Books, Inc.*, 56 F.T.C. 69, 79-80 (1959); *In re National Educators, Inc.*, 49 F.T.C. 1358, 1362-1363 (1953); *In re Encyclopeadia Britannia, Inc.*, 48 F.T.C. 1416, 1425-1427 (1952); *In re National Surveys and Education Development Co.*, 47 F.T.C. 888, 894-895 (1951); *In re Americana Corp.*, 45 F.T.C. 32, 43-44 (1948); *In re General Surveys, Inc.*, 34 F.T.C. 1157, 1162-1163 (1942); *In re Holst Publishing Co.*, 24 F.T.C. 404, 414-415 (1937); *In re World Library Guild, Inc.*, 23 F.T.C. 598, 604-606 (1936); *In re American Academic Research Society*, 17 F.T.C. 419, 420-421 (1933); *In re Consolidated Book Publishers, Inc.*, 14 F.T.C. 13, 18-19 (1930).

[11]A cease and desist order was entered against Americana Corp., one of Grolier's subsidiaries and a petitioner here, in 1948. See *In re Americana Corp.*, 45 F.T.C. 32, 47-48 (1948), modified, 46 F.T.C. 253 (1949). This order proscribed some of the practices used in the present case, including representations by salespersons that they were something other than salespersons. 46 F.T.C. at 254. Two civil penalty actions have been brought for violations of this order, and Americana Corp. has been required to pay $118,000 in civil penalties (Tr. 15447-15449). In 1964, the Commission accepted a consent order against Grolier Enterprises, Inc., another petitioner. See *Grolier Enterprises, Inc.*, 65 F.T.C. 901 (1964). In 1966, the Commission issued a proposed complaint challenging several recruiting practices and misrepresentations that were challenged here. Grolier executed an Assurance of Voluntary Compliance in 1967 to forestall further legal action by the Commission at that time (C.A. App. 5536-5561).

basis for compensation. In mandating each of these provisions, the Commission carefully evaluated the surrounding circumstances and explicitly found in each instance that the provision in question was necessary to prevent deception.[12]

The court of appeals scrutinized each provision in the context of the Commission's findings in order to determine the reasonableness of the order in remedying "the illegal trade practices the [Commission] seeks to prevent" (Pet. App. A7). The court expressly found that the Commission's findings were supported by substantial evidence (Pet. App. A9). For example, the court sustained the "card-at-the-door" requirement because "[a]ny less stringent disclosure

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[12]In considering the "card-at-the-door" requirement, the Commission assessed both the need to order exact disclosures and the size of the card. It concluded that "[e]ach of the disclosures required to be included on the card * * * is necessary to prevent future violations," and that the size of the card was necessary as well (Pet. App. E7-E8). With respect to the disclosure (that a salesperson may call) required in lead-gathering materials, the Commission held that this requirement was needed to remedy the deceptive non-disclosure of this material fact (Pet. App. E8). The Commission also found that:

> [I]t is necessary to place this important language in ten point bold face to assure that the consumer will be apprised of the message. The proposed language includes a disclosure that the consumer may be contacted by a sales representative for the purpose of selling the applicable product. There is no question that the main purpose of respondent's sales representatives in contacting persons at their homes is to sell its products. Any other assertion or inference would be deceptive.

(Pet. App. E9). Finally, in connection with petitioners' deceptive recruitment practices, the Commission found:

> Under these circumstances, the order provision requiring respondent to disclose in advertising that it is recruiting "encyclopedia salesmen" is necessary to prevent a continuation of the type of deception which has misled job applicants in the past.

(Pet. App. E4). Thus, petitioners' contention (Pet. 12) that the "reasonably necessary" test was not applied in this case is baselsss.

requirement would be difficult to enforce and might allow Grolier to continue its deceptive practices" (*id.* at A7).

Both the Commission and the court of appeals correctly applied the "reasonably necessary" test, and concluded that on this record, the specific remedies adopted were necessary to correct and prevent Grolier's misrepresentations. There is, therefore, no conflict with any of the cases cited by petitioner (Pet. 12-14) applying to particular facts the well established rule that the Commission's remedies can "go no further then * * * to prevent future deception" (*id.* at 14).

2. The court of appeals has twice considered whether ALJ von Brand should have been disqualified. Whatever the soundness of the decision in *Grolier I*,[13] the Commission faithfully complied with the mandate to determine whether, in fact, von Brand obtained any *ex parte* information about the *Grolier* case while serving as a legal assistant to Commissioner MacIntyre. Although petitioners appear to disagree with the decision of the Commission and the court in *Grolier II* that no further discovery is necessary (Pet. App. A3, A4, F6, F8),[14] they do not seek review on this issue. Instead, they ask the Court to disqualify the ALJ under 5 U.S.C. 554(d) and the Due Process Clause on a novel *per se* theory: that he "should be charged with participation in the investigation or prosecution of petitioners during his tenure

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[13]Some commentators have suggested that the *Grolier I* standard—which was met here—may be unduly stringent. See 3 K. Davis, *Administrative Law Treatise* § 18.5, at 359 (2d ed. 1980); Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 771-772 (1981).

[14]Grolier, which never utilized the extensive documentation it obtained under FOIA in its discovery arguments to the Commission and the court of appeals (Pet. App. F5), ultimately received every document it sought. Not one linked von Brand to any *ex parte* information about Grolier, and sworn statements by him and former Commissioner MacIntyre showed that no such link existed. See page 8, *supra*.

as attorney-adviser because his commissioner had so participated" (Pet. 17). Thus, having failed on remand to bear the burden of proving actual participation, petitioners now belatedly ask this Court to consider the per se disqualification rule rejected in *Grolier I* (Pet. App. C9-C10).

There is no basis in law for this standard. First, the "actual involvement" standard announced in *Grolier I* (Pet. App. C9, C10) accords with the plain language of 5 U.S.C. 554(d). That statute provides that "[a]n employee or agent *engaged* in the performance of investigative or prosecuting functions for an agency * * * may not, in that or a factually related case, participate or advise in the decision * * *" (emphasis added). It follows, as the court of appeals held in *Grolier I* (Pet. App. C9-C10), that investigative and prosecuting personnel "are precluded only from participating in the adjudication of cases in which they have actually performed such [investigative and prosecuting] functions, and in 'factually related cases'."

Second, this conclusion accords with the decisions of all other courts that have considered the matter. See, *e.g.*, *Au Yi Lau* v. *INS*, 555 F.2d 1036, 1043 (D.C. Cir. 1977); *Cisternas-Estay* v. *INS*, 531 F.2d 155, 158, 160-161 (3d Cir.), cert. denied, 429 U.S. 853 (1976); *Twigger* v. *Schultz*, 484 F.2d 856, 858, 861 (3d Cir. 1973); *San Francisco Mining Exchange* v. *SEC*, 378 F.2d 162, 170 (9th Cir. 1967); *R.A. Holman & Co.* v. *SEC*, 366 F.2d 446, 452-453 (2d Cir. 1966), modified on other grounds, 377 F.2d 665, cert. denied, 389 U.S. 991 (1967).[15] The Commission thus correctly held (Pet. App. F7) that actual involvement, not what "might have" happened, is the controlling test.

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[15]Petitioners' reliance on *Amos Treat & Co.* v. *SEC*, 306 F.2d 260 (D.C. Cir. 1962), and *American General Insurance Co.* v. *FTC*, 589 F.2d 462 (9th Cir. 1979), is misplaced. In *Amos Treat*, it was undisputed

This practical requirement arises from the nature of the administrative process itself, which, as *Grolier I* recognizes, contemplates that agency members and their advisers may participate both in evaluating pre-complaint investigations and in deciding post-complaint adjudications (Pet. 8). 5 U.S.C. 554(d)(C). This Court has held that exposure of a decisionmaker to investigative facts does not automatically mandate disqualification or create a presumption of bias. See *Withrow* v. *Larkin*, 421 U.S. 35, 47, 50 n.16, 52-53, 55 (1975) (exposure to evidence presented in non-adversary investigation insufficient to impugn the fairness of the Board members at later adversary hearing); accord *Hortonville Joint School District No. 1* v. *Hortonville Education Association*, 426 U.S. 482, 493 (1976); *Consolo* v. *FMC*, 383 U.S. 607, 626 n.27 (1966);[16] *FTC* v. *Cement Institute*, 333 U.S. 683, 700-703 (1948).

In each case, the burden of proving actual disqualifying facts falls on the party challenging the adjudicator's participation. *Schweiker* v. *McClure*, 456 U.S. 188, 196 (1982); *R.A. Holman & Co.* v. *SEC, supra*, 366 F.2d at 454; *SEC* v. *R.A. Holman & Co.*, 323 F.2d 284, 287 (D.C. Cir. 1963). There is, moreover, a strong presumption that ALJs and other adjudicatory officials will be objective and unbiased. *Schweiker* v. *McClure, supra*, 456 U.S. at 195; *Withrow* v. *Larkin, supra*, 421 U.S. at 47.

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that a member of the Commission hearing the case had actually participated in the investigation of the Treat firm before he was a Commissioner. 306 F.2d at 262, 265, 266. Similarly, in *American General Insurance Co.*, the court held that the challenged FTC Commissioner had actually participated in the case by appearing as counsel before the Ninth Circuit and signing a brief. 589 F.2d at 463.

[16]In *Consolo*, a party challenged agency counsel's participation in the writing of a decision after having represented the FMC in the court of appeals during an earlier appeal in the same case. This Court "examined [the] contention * * * and [found] it without merit." But see *American General Insurance Co.* v. *FTC, supra*.

To make the mere possibility of exposure to investigative facts sufficient for disqualification would add to 5 U.S.C. 554(d) a standard that is far more rigorous, and far more removed from reality, than Congress thought necessary. The separation-of-functions provision in the Administrative Procedure Act was a careful balancing of appearances and reality. It was designed to exclude those who had developed a partisan view from off-the-record participation in administrative decision-making. *Attorney General's Manual on the Administrative Procedure Act* 57 (1947). This balance struck by Congress in defining the limits of administrative procedures should be supplemented by judicial implication only where due process demands it. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543-545 (1978).

Due process under the Fifth Amendment excludes "generalized assumptions of possible interest" that lack a record basis for inferring bias or an interest in the outcome of a case. *Schweiker* v. *McClure, supra*, 456 U.S. at 196 (hearing officers who adjudicate Part B medicare insurance claims are not disqualified because they are insurance carrier employees). No such basis can reasonably be said to exist where a hearing officer, who previously served as a Commissioner's adviser, might have been exposed to investigative reports but cannot recall ever having seen them, and there is no evidence whatever pointing to a different conclusion.[17]

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[17]Petitioners are mistaken in their reliance on former Chairman Engman's statements concerning the constructive knowledge of former attorney-advisers and the Commission's refusal to grant clearance to a former attorney-adviser to represent a party before the Commission. The Fifth Circuit, like the court in this case (Pet. App. C9), has rejected the view that an attorney-adviser is chargeable with the same insider knowledge chargeable to his Commissioner. *Gibson* v. *FTC*, 682 F.2d 554, 567 (1982), cert. denied, No. 82-972 (Apr. 4, 1983). Moreover, the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Commission's clearance rules are concerned with a different issue—the appearance of unfairness that may arise from access to "inside information"; disqualification of a hearing officer rests instead on the possibility of partisan bias or prejudgment. *In re Kroger Co.*, 93 F.T.C. 220 (1979).

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